TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible] 96

THE CITIZENS NATIONAL BANK OF KANSAS CITY, MISSOURI, PLAINTIFF IN ERROR,

vs.

M. B. C. DONNELL.

[illegible]

(18,933.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 283.

THE CITIZENS NATIONAL BANK OF KANSAS CITY, MISSOURI, PLAINTIFF IN ERROR,

vs.

M. S. C. DONNELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Missouri before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Citizens National Bank of Kansas City, Missouri, plaintiff and respondent and M. S. C. Donnell, defendant and appellant, wherein was drawn in question the validity of an authority exercised under the United States by the Citizens National Bank of Kansas City, Missouri, aforesaid, a national bank in the transaction of its business as such, and the decision was against its validity; and wherein was drawn in question the construction of a statute of the United States, to wit, sections 5197 and 5198 of that portion of the Revised Statutes of the United States commonly known as the national banking act and the decision was against the title right, privilege or exemption specially set up and claimed under such statute; a manifest error hath happened to the great damage of the said The Citizens National Bank of Kansas
2 City, Missouri, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23rd day of April, in the year of our Lord one thousand nine hundred and three.

Issued at office in the city of Jefferson with the seal of the circuit court of the United States for the central division of the western district of Missouri, dated as aforesaid.

{Seal of the United States Circuit Court for the Western District of Missouri, Central Division.}

H. C. GEISBERG,
Clerk of the Circuit Court of the United States, Central Division, Western Judicial District of Missouri.

Allowed by
W. M. ROBINSON,
Judge and Chief Justice of the Supreme Court of the State of Missouri.

Return to Writ.

STATE OF MISSOURI, *sct:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case together with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the supreme court of the State of Missouri, at the city of Jefferson, this 2nd day of May, 1903.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

[Endorsed:] Filed Apr. 23 1903. Jno. R. Green clerk.

3 UNITED STATES OF AMERICA, *ss:*

To M. S. C. Donnell, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Missouri wherein The Citizens National Bank of Kansas City, Missouri is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Waltour M. Robinson, chief justice and judge of the supreme court of the State of Missouri, this 23rd day of April, in the year of our Lord one thousand nine hundred and three.

W. M. ROBINSON,
Chief Justice and Judge of the Supreme Court of the State of Missouri.

Service of this citation accepted this 24th day of April 1903.

EDWARD P. GARNETT,
Attorney for M. S. C. Donnell, Defendant in Error.

[Endorsed:] Filed Apr. 23, 1903. Jno. R. Green, clerk.

4 STATE OF MISSOURI, *sct:*

Be it remembered, that heretofore to-wit, on the 13th day of January, 1899, there was filed in the office of the clerk of the supreme court of the State of Missouri, a certified copy of the judgment and

order granting an appeal in a certain cause wherein The Citizens National Bank of Kansas City, Missouri, was respondent and M. S. C. Donnell was appellant, which said certified copy of judgment and order granting an appeal is in words and figures as follows, to-wit:

Be it remembered that on the 60th day of the regular April term, A. D. 1898, of the circuit court of Jackson county, State of Missouri, at Kansas City, the same being the 2nd day of July, A. D. 1898, the following proceedings were had and made of record in the cause entitled:

THE CITIZENS NATIONAL BANK OF KANSAS CITY, MISSOURI, Plaintiff, *vs.* M. S. C. DONNELL, Defendant. } 29538.

Now on this day comes plaintiff herein, The Citizens National Bank of Kansas City, Missouri, by its attorneys, Warner, Dean, Gibson & McLeod, and comes also defendant, M. S. C. Donnell, by his attorneys, R. B. Garnett and W. C. Forsee, and the motion of said defendant to re-refer this case, heretofore filed herein, coming on for hearing, the same is by the court taken up, heard and duly considered, and after argument of counsel and due deliberation the court overruled said motion to re-refer this cause.

And the exceptions heretofore filed herein by said defendant to the report of the referee, Hon. R. E. Ball, coming on regularly for hearing said exceptions are by the court taken up, heard and duly considered; and after argument of counsel thereon and after due deliberation the court overrules said exceptions to the report of the referee and each and every one thereof; and the report of said referee, heretofore filed herein is by the court taken up, heard and duly considered and said report of the referee in this cause
5 is by the court duly and regularly confirmed in all respects; and the court, upon said report of said referee doth find all the issues herein for plaintiff and against defendant, and doth further finds that on April 29th, 1896, said defendant M. S. C. Donnell for value received made, executed and delivered his negotiable promissory note of that date to plaintiff herein for the sum of twenty thousand dollars ($20,000), with interest thereon from said last named date until paid at the rate of eight (8) per cent. per annum; and the court doth further find that on January 25th, 1898, after the commencement of this suit said defendant paid the plaintiff the sum of five thousand dollars ($5,000) on said note, leaving on said last named date a balance due on said note from defendant to plaintiff the sum of seventeen thousand seven hundred and eighty-two and 04/100 dollars, ($17,782.04) which last named sum with interest thereon at the rate of eight (8) per cent. per annum from January 25th, 1898, is due and owing from said defendant to said plaintiff, together with its costs herein expended and incurred; and the

court doth further find that said referee, Hon. R. E. Ball, was engaged for the period of ten days in the trial and consideration of this cause and that he incurred an expense of seventy-four dollars and twenty-five cents, ($74.25) for his stenographer to take the testimony before him as such referee.

Wherefore it is ordered, adjudged and decreed by the court that plaintiff herein The Citizens National Bank of Kansas City, Missouri, have and recover of and from defendant herein, M. S. C. Donnell the sum of eighteen thousand, four hundred and six and 79/100 dollars ($18,406.79) together with interest thereon from this date at the rate of eight (8) per cent. per annum until paid together with its costs herein incurred and expended; and the court doth further order, adjudge and decree that said R. E. Ball as referee herein be and is hereby allowed the sum of one hundred dollars ($100) as compensation for his services herein and that A. P. Barnett, the stenographer who took the testimony in the cause before said referee be and is hereby allowed for his services as such stenographer the sum of $74.25; and that clerk of this court be and is hereby ordered and directed to enter up and charge as costs
6 in this cause the allowances herein made to said referee and stenographer; for all of which execution shall issue herein.

On the 72nd day of the regular April term, the same being the 8th day of October, A. D. 1898, the following proceedings were had and made of record in the cause entitled:

CITIZENS NATIONAL BANK OF KANSAS CITY, MISSOURI,
vs.
M. S. C. DONNELL. } 29538.

Now on this day comes defendant by attorney and files affidavit for an appeal from the judgment and decision of the court in this cause and upon consideration thereof the court grants and allows defendant an appeal in this cause as prayed for.

And by stipulation filed herein it is ordered by the court that the time heretofore given defendant to file bill of exceptions herein, be and the same is extended until on or before January 1st, 1899.

STATE OF MISSOURI,
County of Jackson, } *ss:*

I, H. M. Stonestreet, clerk of the circuit court of Jackson county, Missouri, do hereby certify that the foregoing is a full, true and complete copy of judgment and order allowing appeal, in the cause wherein Citizens National — of K. C. Mo., is plaintiff, and M. S. C. Donnell is defendant, as fully as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office in Kansas City, Missouri, this 9th day of December, A. D. 1898.
[SEAL.]

H. M. STONESTREET, *Clerk,*
By A. M. ALLEN, JR., *D. C.*

And afterwards, to-wit, on the 13th day of September, 1901, the said appellant filed his abstract of the record in said cause,
7 which said abstract of record is in words and figures as follows, viz:

In the Supreme Court of the State of Missouri, Division No. 2.

THE CITIZENS' NATIONAL BANK OF KANSAS CITY, Missouri, Respondent,
vs.
MACK S. C. DONNELL, Appellant.
} No. 9635.

Appellant's Abstract of the Record.

This action was begun February 20th, 1897, by filing in the office of the clerk of the circuit court of Jackson county, Missouri, at Kansas City, a petition in words and figures as follows, omitting the caption:

Petition.

"Plaintiff for its cause of action against said defendant states first, that it is and was at all times hereinafter mentioned a corporation duly organized and existing under the laws of the United States relating to national banks.

Second. That on, to-wit, the 29th day of April, 1896, the said defendant, under and by the name of M. S. C. Donnell, made, executed and delivered his certain negotiable promissory note expressed to be for value received, a duly verified copy of which is herewith filed, whereby he promised to pay to plaintiff, or order, on demand, the sum of twenty thousand dollars ($20,000), at the office of plaintiff in Kansas City, Missouri, with interest from the date thereof at eight per cent. per annum until paid; that payment of said note has often been demanded of defendant, but defendant has failed and refused to pay the same, and said note remains overdue and unpaid; and plaintiff is the legal owner and holder thereof.

Wherefore, plaintiff asks judgment against said defendant for the sum of twenty thousand dollars ($20,000), with interest thereon from the 29th day of April, 1896, at the rate of eight per cent. per annum and for its costs.

WARNER, DEAN, GIBSON & McLEOD,
Att'ys for Plaintiff."

Attached to said petition were the following exhibits duly certified:

"$20,000.00. KANSAS CITY, Mo., *April* 29, 1896.

For value received, on demand after date, I promise to pay to The Citizens' National Bank of Kansas City, Mo., or order twenty,

thousand 00-100 dollars at its office in Kansas City, Mo., with interest from date at eight per cent. per annum until paid.

No. 32020.

Due D.

M. S. C. DONNELL."

8 On the back of said note is the following:

"This note and any other indebtedness I now owe or may hereafter incur to the said bank is secured by the following collateral: Note and mtg. dated July 29, '86, made by Catherine and M. S. C. Donnell, and notes and mtg. $12,000.00, $6,000.00, $10,000.00, dated Sept. 14, '95, made by M. S. C. Donnell, with full authority to sell the same at public or private sale, without notice, on non-payment of this note or any other indebtedness to the bank.

M. S. C. DONNELL."

Summons was issued and served on defendant returnable at the April term, 1897, of said court.

Thereafter, to wit, on January 8th, 1898, defendant filed an amended answer, which is, omitting the caption, in words and figures as follows:

Amended Answer.

"Leave of court being first had and obtained, defendant files herein his amended answer and says:

(No question is made upon the issues raised by the first paragraph of this answer.)

2nd. He denies each and every allegation in plaintiff's petition contained.

3rd. For further answer, defendant admits that plaintiff is a national bank organized and operating under the acts of Congress in that behalf enacted, and says that on or about Oct. 14, 1892, plaintiff purchased of one I. B. Mason a negotiable promissory note theretofore made by defendant and wife to said Mason as payee, in the sum of $15,000, bearing 7 per cent. interest; that thereafter, on July 1, 1895, defendant made and delivered to plaintiff his promissory note for $17,500 for the purpose of evidencing the same debt as was evidenced by the said Mason note, and also certain amounts of legal interest due on the said Mason note, together with certain amounts of interest on the said Mason note over and above the rate by law collectible or demandable of defendant thereon. That a portion of the amount represented by the difference between the said Mason note and said $17,500 note was unjust, illegal and usurious interest, by plaintiff knowingly and unlawfully charged and calculated and added into said $17,500 note, which said amounts it was and is unlawful for plaintiff to demand, exact or collect from defendant. That upon the making of said $17,500 note said Mason

note was retained by plaintiff, both of said notes representing one and the same debt. That thereafter defendant made and delivered his promissory note to plaintiff dated October 1, 1895, for $2,500. That thereafter said $17,500 note and said $2,500 note were merged into two notes, one for $20,000 and one for $2,000, making defendant's nominal indebtedness to plaintiff $22,000. That the difference between the said $20,000, represented by the said two notes of $17,500 and $2,500, and said $22,000, evidenced by said two notes, one for $20,000 and one for $2,000, was in whole or in part illegal, unjust and usurious interest, by plaintiff knowingly and unlawfully charged and added unto said notes, which it was and is unlawful for plaintiff to demand, exact or receive. That the amount of legal and illegal interest on the said Mason note up to the date of the said $17,500 note, and on and in said other notes down to and including the said two notes aggregating $22,000, to this date is more than the sum of $4,500. That the $20,000 note herein sued on is the $20,000 note hereinabove mentioned. That the illegal, unjust and usurious interest included in said notes aforesaid and now herein demanded of defendant was by plaintiff knowingly and unlawfully charged, exacted and demanded of defendant and calculated into said notes, and precludes plaintiff from collecting any interest whatever on the said Mason note, or any subsequent one, including said $20,000 note and said $2,000 note.

R. B. GARNETT,
WM. C. FORSEE,
Att'ys for Defendant."

And afterwards, to-wit., on January 26th, 1898, the plaintiff filed an amended reply, which is in words and figures as follows, the caption being omitted:

9 *Amended Reply.*

"Now comes plaintiff herein and leave of court being first had and obtained for amended reply to the amended answer of defendant filed herein on January 8th, 1898, says:

1st. That plaintiff denies each and every allegation of new matter contained in said amended answer except as such are herein specially admitted.

Wherefore, plaintiff asks judgment as prayed in its petition in this case.

2nd. For further reply plaintiff says that it admits it purchased of one, I. B. Mason, a negotiable promissory note made by defendant and his wife to said Mason, which note was in the principal sum of $15,000 and bearing seven per cent. interest; and plaintiff further says that it purchased said note at the special instance and request of said defendant in order to prevent a foreclosure of the deed of trust on the property of defendant and his wife under a deed of trust securing said note.

Plaintiff admits that defendant executed to plaintiff his promissory

note of $17,500, but says that the same is dated July 12th, 1895, instead of July 1st, 1895, but denies that there is any unlawful or usurious interest embodied in or connected with said $17,500 note and denies that plaintiff has demanded any usurious interest thereon. Plaintiff denies that any part of the note represented by the difference between said Mason note and said $17,500 note was unjust, illegal or usurious interest, and plaintiff denies that any usurious interest whatever was knowingly or unlawfully charged or calculated or added into said $17,500 note. Plaintiff admits that it retained said Mason note. Plaintiff admits that the indebtedness of defendant to plaintiff is $22,000 and alleges that there is interest on said last named sum from April 29th, 1896, to this date. Plaintiff denies that the difference between $20,000 and $22,000 was or is in whole or in part illegal or unjust or usurious interest and denies that plaintiff knowingly or unlawfully charged or added into said notes or any one of them any unlawful or usurious interest, or demanded, or exacted, or received usurious interest on any of said notes. Plaintiff denies that there is or was any of said notes. Plaintiff denies that there is or was any illegal interest on said Mason note charged, collected or received up to the date of the giving of said $17,500 note or at all. Plaintiff denies that there is any illegal, unjust or usurious interest included in any of the notes mentioned in defendant's said amended answer, and denies that plaintiff knowingly or unlawfully charged, exacted or demanded of defendant or calculated into any of said notes any illegal, unjust or usurious interest and denies that any interest charged defendant by plaintiff precludes plaintiff from collecting any interest on said Mason note or the notes now held by plaintiff against defendant.

Plaintiff further says that it did not and has not charged, demanded, exacted, taken, received or collected from defendant, directly or indirectly, any illegal, unjust or usurious interest on any of the notes described in defendant's said amended answer within two years next before the commencement of this suit or within two years before defendant filed answer herein, or within two years before April 29th, 1896, the date of the note herein sued on, or within two years after the happening of any transaction at any time had between plaintiff and defendant, as mentioned in defendant's said amended answer or at all.

Wherefore, plaintiff asks judgment as prayed in its petition herein.

WARNER, DEAN, GIBSON & McLEOD,
Attorneys for Plaintiff."

On January 13th, 1898, the parties filed in said court the following stipulation, caption being omitted:

Stipulation for Reference.

"It is hereby stipulated and agreed by and between the parties hereto that all the issues of fact and of law involved in the trial of the above entitled cause may be referred to R. E. Ball, Esq., according to law, this being a proper case for reference and said Ball being a proper person for referee.

WARNER, DEAN, GIBSON & McLEOD,
Attorneys for Plaintiff.

R. B. GARNETT,
W. C. FORSEE, *Attorneys for Defendant.*"

And on the same day, that being the 4th day of the regular January term, 1898, of said court, the following order was made and entered of record, to-wit:

Order of Reference.

"Now, on this day, in accordance with stipulation filed by the parties hereto, the court refers this cause and all issues therein to R. E. Ball, Esq., one of the attorneys of this court, as a referee to hear and decide all the issues herein, and that said R. E. Ball is directed to proceed with diligence to hear and determine the matters and controversies herein according to law and to report his findings of fact and conclusion of law, together with the testimony taken herein, to this court with all convenient speed; said R. E. Ball not being akin to any party nor interested in the event of this action."

And afterwards, on January 26th, 1898, said R. E. Ball made affidavit that he would fairly and faithfully hear and examine said cause and make a just, impartial and true report according to the best of his understanding.

And afterwards, to-wit., on January 31st, 1898, this cause coming on to be heard before R. E. Ball, referee, plaintiff appeared by Messrs. Warner, Dean, Gibson & McLeod, its attorneys, and defendant appeared by Messrs. R. B. Garnett and W. C. Forsee, his attorneys, and the following proceedings were had to-wit:

And thereupon the plaintiff, to sustain the issues upon its part, offered and introduced evidence as follows:

Plaintiff's Case.

By Judge GIBSON: I introduce in evidence the negotiable promissory note, sued on in this action, dated Kansas City, Missouri, April 29th, 1896, payable on demand after date to the plaintiff in this case, or order, for the sum of twenty thousand dollars at the office of the plaintiff in Kansas City, Missouri, with interest from date at

the rate of 8 per cent. per annum until paid, signed by the defendant.

I also introduce in evidence endorsements on this note which, in their order, are as follows:

The first endorsement that I shall read is stamped upon the note, together with having been written in with ink, signed by M. S. C. Donnell.

"This note and any other indebtedness I now owe, or may hereafter incur to the said bank, is secured by the following collateral: Note and mortgage dated July 29th, 1886, made by Catherine and M. S. C. Donnell; a note and mortgage for $12,000, $6,000 and $10,000, dated September 14th, 1895, made by M. S. C. Donnell with full authority to sell the same at public or private sale without notice on non-payment of this note or any other indebtedness to the bank."

(Signed) M. S. C. DONNELL."

Then there is also endorsed on the said note the following:

"Interest to this date amounting to $2,782.04 is this day paid on within note—January 25th, 1898."

Underneath that is the following endorsement:

"$2,217 96 is this day paid on the principal of the within note, January 25th, 1898."

By Judge GIBSON: This includes all the endorsements on the note.

Plaintiff rests.

11 Counsel for defendant object to the introduction of the indorsements on the back of said note for the reasons that it is not shown that there is any authority for said indorsements. There is nothing in the pleadings to authorize those indorsements last mentioned—that is, those dated January 25th, 1898.

By Judge GIBSON: I will state to your honor that the defendant paid some on this note the other day—that is, since the commencement of this suit.

By the REFEREE: The objection will be overruled. The indorsements referred to are in the nature of concessions of credit, and, as they stand, it makes the debt less than he demands in the petition.

And thereupon plaintiff rested its case.

Defendant's Testimony.

Thereupon defendant, to sustain the issues upon his behalf, offered and introduced in evidence testimony as follows:

Defendant offered in evidence a copy of an agreement or direction to the plaintiff in reference to a certain fund of $5,500.00. Said paper was marked "Exhibit A," and is in words and figures as follows:

"EXHIBIT A."

"KANSAS CITY, MISSOURI, *January* 24, 1898.

Citizens' National Bank, Kansas City, Missouri.

GENTLEMEN: On payment to you this day of $5,500 by the Home Realty Company, the purchaser of lots four (4), six (6), and all of lot five (5), except 80 feet by 112½ feet out of the west side, heretofore sold, all in Colonel E. M. McGee's subdivision of the southwest quarter of the northeast quarter of section 8, in township 49, range 33 west, according as the same is described in the warranty deed to said Home Realty Company, as the same is designated on the recorded plat of said subdivision, all in Jackson county, Missouri, you are hereby ordered and directed to cancel the note for $6000.00 and interest, described in and secured by the deed of trust dated September 14, 1895, recorded January 28th, 1896, in Book B 606, at page 70, in the office of the recorder of deeds of Jackson county, Missouri, at Kansas City; and you are further authorized, directed and ordered to release said real estate from the lien and effect of said deed of trust and to satisfy the same upon the record thereof, and to cancel and surrender to said The Home Realty Company said $6,000 note and interest, it being the same note and deed of trust now held by said bank.

Witness my hand this 24th day of January, 1898, at Kansas City, Jackson county, Missouri.

M. S. C. DONNELL.

Witness:
C. H. KIRSHNER."

By Judge GIBSON: Each of the three collateral notes was secured by different pieces of property, and the note mentioned in this agreement just read was the $6,000 collateral note, and the property described in the agreement was that property?

By Mr. GARNETT: Yes.

M. S. C. DONNELL, the defendant, called as a witness on his own behalf, testified as follows:

Direct examination by Mr. GARNETT:

The WITNESS: I am the defendant in this case. Have been doing business with this bank for a good many years. I have borrowed considerable money and had a running account at the bank. I have my checks and bank book with me. (Witness hands counsel bank book from 1892 to time of trial.) This is the book kept by the bank with me, as a customer of the bank. It is commonly called a "pass book." It contains transactions from January 29th, 1891, to May 1st, 1896.

Said book was offered in evidence under mark of "Exhibit B" and is as follows:

"EXHIBIT B"—(Pass Book).

12 *Citizens National Bank in Account with M. S. C. Donnell.*

1891		
Jan. 29	Bal	$460 28
2-24		45 00
3-7		550 00
		1055 28
2-14		23 10
2-2		20 00
17		30 00
		1128 38
	Ch'ks ret.	578 60
3-21, 91	Bal	549 78
21		30 00
4-4		60 00
21		25 00
5-2		65 00
16		75 00
		804 78
	Ch'ks ret.	328 84
5-21, 91	Bal	475 94
6-1		40 00
3		437 19
30		33 40
6-4		500 00
7-10		41 50
8-3	Rent 1704 McGee	15 00
		1543 03
	Ch'ks ret.	1039 54
8-8	Bal	503 49
8-8		25 00
18		30 00
9-12		50 00
14	Dis	197 20
15		15 00
25		28 00
	F'd	848 69

15		30 00
19		68 35
25	Dis.	994 89
		(1941 93)
9-1		25 00
28		10 00
		1976 93
	Ch'ks ret.	1859 78
11-14, 91	Bal.	117 15
14		27 00
16		30 00
25	Dis.	6071 86
12-19		35 00
24		55 00
1-21		40 00
27		30 00
12-19		10 00
	Am't for'd.	6416 01
	Ch'ks ret.	6292 02

13

2-1, 92	Bal.	123 99
4		5000 00
5		1310 18
5		126 42
9		100 00
	Dis.	1470 00
2-23		78 00
		8208 59
	Ch'ks ret.	8164 76
3-9, 92	Bal.	43 83
24	Dis.	690 20
6-20	Dis.	6370 00
		7104 03
8-22		40 00
		22 00
		496 33
	For'd	7662 36
2-26		77 00
5-3		60 00
6-21		55 00
4-5		40 00

7		35 00
6–30		60 00
		7989 36
	Ch'ks ret	7891 08
9–8	Bal	98 28
29		40 00
Oct. 4	Dep	7758 50
28		500 00
29		1000 00
29		7000 00
31		100 00
		16496 78
	Ch'ks ret	16134 09
11–1	Bal	362 69
	For'd	362 69
12–17		80 00
1–6		50 00
1–10	Dis	1300 00
25		50 00
2–1		63 50
2–14		20 00
3–9		50 00
		1976 19
	Ch'ks ret	1911 54
3–11, 93	Bal	64 65
25		50 00
4–10		200 00
12		35 00
5–3		72 10
13		25 25
23		40 00
26		28 00
June 21		2500 00
	For'd	3015 00
26		65 00
13		41 00
14		3121 00
	Ch'ks ret	**3556 46**
7–1, 93	Dr. bal	435 46
Feb. 15, 95	Per Scruggs loan	1750 00
7–13		827 24

15		80 00
9-4		100 00
		2757 24
	Ch'ks ret	**3024 54**
9-6, 95	Dr. bal	267 30
Oct. 1	Note	2500 00
1	Dep	35 00
23	D	60 00
28		45 00
30		250 00
11-15		40 00
4-29	Bal. note	922 32
	For'd	3852 32
	Ch'ks. ret	**3849 90**
5-1, 96	Bal	2 42

Defendant thereupon offered in evidence checks on plaintiff bank charged to defendant's account, which were admitted in evidence under exhibit marks, as follows:

Exhibit.	Date.	In favor of—	Am't.	When paid.
"C"	April 10, '93	Henry M. Stonestreet or bearer.	36 00	April 10, '93
(Lost)	April 10, '93		120 00	
(Lost)	April 10, '93		120 00	
"D"	May 13, '93	C. A. Donnell	150	May 16, '93
"E"	May 31, '93	L. B. Eveland, tr	589 52	June 1, '93
"F"	June 22, '93	M. T. C. Williams	100	June 22, '93
"G"	June 21, '93	W. H. Seeger, pt	1872 80	June 22, '93
"H"	June 23, '93	Self or bearer	1 00	June 23, '93
"I"	June 23, '93	R. B. Garnett	25	June 28, '93
"J"	June 30, '93	W. H. Seeger, pt. or bearer	525	June 30, '93
"K"	6-30-93	**Int.** (Signed: Charge to M. S. C. Donnell.	**3 14**	Marked paid
"M"	7-13-93	**Int**	**4 49**	Marked paid
"N"	8-31-93	**Int**	**4 53**	Marked paid
"O"	9-30-93	**Int. or bearer**	**4 44**	Marked paid
"P"	10-31-93	**Int**	**4 62**	Marked paid
"Q"	11-29-93	**Int**	**4 53**	Marked paid
"R"	12-30-93	**Int**	**4 58**	Marked paid
"S"	1-31-94	**Int**	**4 77**	Marked paid
"T"	2-28-94	**Int**	**4 35**	Marked paid
"U"	3-31-94	**Int**	**4 86**	Marked paid
"V"	4-30-94	**Int**	**4 76**	Marked paid
"W"	5-31-94	**Int**	**4 97**	Marked paid
"X"	6-30-94	**Int**	**4 86**	Marked paid
"Y"	7-31-94	**Int**	**5 07**	Marked paid
"Z"	8-31-94	**Int**	**5 12**	Marked paid
"1"	9-29-94	**Int**	**5 01**	Marked paid
"2"	10-31-94	**Int**	**5 22**	Marked paid
"3"	11-30-94	**Int**	**5 11**	Marked paid
"4"	12-31-94	"	**5 33**	Marked paid

Exhibit.	Date.	In favor of—	Am't.	When paid.
"5"	1-31-99	Int.	5 40	Marked paid
"6"	Feb. 18, '95	Anna B. Wagner	544 80	Feb. 18, '95
"7"	Feb. 18, '95	W. H. Scruggs note, $656.38 and int.	672 12	Feb. 18, '95
"8"	Feb. 18, '95	W. H. Seeger, cash	525	Feb. 18, '95
"9"	Feb. 28, '95	Int.	4 90	Marked paid
"10"	3-30-95	Int.	5 24	Marked paid
"11"	Ap'l 24, '95	W. H. Seeger, cash	50	Apr'l 25, '95
"12"	4-30-95	Int. or bearer	5 30	Marked paid
15				
"13"	5-31-95	Int. or bearer	6 00	Marked paid
"14"	6-29-95	Int.	5 90	Marked paid
"15"	July 11, '95	T. D. Windiate	52 75	July 17, '95
"16"	July 25, '95	Thos. D. Windiate	152 92	July 24, '95
"17"	July 26, '95	Theo. S. Case, J. P.	19 13	July 29, '95
"18"	Aug. 29, '95	Henry Wollman	300	Debit slip
"19"	Sept. 16, '95	F. P. Barnett	200	Sept. 17, '95
"21"	Sept. 30, '95	John J. Green, tr.	641 02	Oct. 1, '95
"22"	9-30-95	Int.	1 55	Marked paid
"23"	Sept. 30, '95	J. W. McCurdy, coll.	1667 19	Oct. 1, '95
"24"	Oct. 28, '95	Forbis & Yeager	240	Oct. 29, '95
"25"	Oct. 28, '95	Anna B. Wagner	175	Nov. 2, '95
"26"	Nov. 5, '95	D. C. Phillips	90 95	Nov. 5, '95
"27"	Nov. 27, '95	F. Barnett	425	Nov. 27, '95
"28"	11-30-95	Int. or bearer	1 70	Marked paid
"29"	12-31-95	Int. or bearer	5 98	Marked paid
"30"	Dec. 31, '95	J. W. McCurdy, coll.	298 35	Jan'y 3, '96
"31"	1-31-96	Int. or bearer	8 83	Marked paid
"32"	2-29-96	Int. or bearer	8 62	Marked paid
"33"	3-31-96	Int. or bearer	9 31	Marked paid
"34"	4-30-96	Int. or bearer	9 10	"

Counsel for plaintiff objected to the introduction of all of said checks in evidence, except such as were payable to plaintiff, as incompetent, irrelevant and immaterial. Said objection was by the referee overruled, and the general ruling made that any checks drawn against defendant's account were admissible in evidence.

Counsel for the plaintiff objected to the introduction of "Exhibit K" unless the signature thereto should be shown to be the signature of defendant.

By the WITNESS: That is a check charged against my account in the bank by the bookkeeper, charged up to me as interest; it was returned to me with my checks, charged to my account.

By the REFEREE: Well, you got it from the bank anyhow?

By the WITNESS: Yes, it was included in the bank statement.

By the REFEREE: Well, then, it will be admitted.

Counsel for the plaintiff objected to the paper as incompetent, and hearsay, and not shown to be a check of defendant.

The REFEREE: The objection is overruled on the ground that it is shown to be one of the vouchers returned from the bank.

Counsel for the plaintiff further objected to the introduction in evidence of all the checks payable to "Int." because it shows a pay-

ment, and because the statute of limitations has run on all of them—the two years' limitation provided by the act of Congress.

By the REFEREE: They will be admitted subject to the objection, without final ruling.

By the WITNESS: I have not got with me the two checks for $120 dated April 10th, 1893. At the time the vouchers were returned those two $120 checks were with them.

Defendant thereupon offered in evidence list of vouchers returned with balance of account of M. S. C. Donnell, from "3-11 '93" to "6-1 '93," with the Citizens National Bank of Kansas City, Missouri.

The same was admitted in evidence and marked "Exhibit L," and is in figures as follows:

"EXHIBIT L."

14.00
36 00
120.00
120.00
150.00
589.52
100.00
1872.80
1.00
3.14
5.25
25.00
3556.46

16 And thereupon defendant offered in evidence a list of vouchers returned with balance of account of M. S. C. Donnell, from "7-1 '93," to "3-30 '95," with the Citizens national bank, Kansas City, Missouri.

The same was admitted in evidence and marked "Exhibit 20," and is in figures as follows:

"EXHIBIT 20."

	4.44
	4.62
	4.53
	4.58
	4.77
	4.35
	4.86
	4.76
	4.97
	4.86
	5.07
	5.12
	5.01
	5.22
	5.11
	5.33
	5.40
	544.80
	672.12
	525.00
	4.90
	5.24
	50.00
	5.30
	6.00
	5.90
	52.75
	105.92
	19.13
	300.00
Dr. bal.	435.46

Defendant also offered in evidence a draft for $525, dated June 30, 1894, payable to the order of S. W. Campbell, which was admitted in evidence under mark of "Exhibit 35."

By the WITNESS: This draft I got from Mr. Seeger, in February, 1895. I gave him my check for $525 for it. That is the check charged in this slip payable to "Seeger" after I received the Scruggs money. It is on my list, dated February 18, 1895, this draft being paid by "Exhibit 8." This draft is the voucher turned over to me in payment of the $525. The check was given to take up the draft which was surrendered to me. The $17,500 note was made up in this way: A note for $15,000, known as the Mason note, six months interest on same, $525, and interest on that interest, $18.37; another semi-annual interest item of $525, and six months' interest on that making $37.29 for twelve months; another coupon of $525, which

would be semi-annual interest on the other, and interest on the principal and interest for 13 days, $42.00, and an overdraft that I owed to the bank $596.74—money that I had already drawn, with a credit of $230.50, all footed up, makes $17,500, the amount of the $17,500 note. That was dated July 12, 1895. I having already owed the bank by overdraft $596.74, Mr. Seeger, when writing the note he got up for me, after he had figured all this interest up, says, "Now, let me see how much your overdraft is," and went to the book and came back and reported $596.74, figuring it up and there was some little money that I had to pay—had to have a little more cash and he added in enough to make it even $17,500. And to get this overdraft off the books he gave me credit for the $230.50 and the amount of the overdraft so as to balance the books. The $827 is composed of the $230 in cash and the $396.74, the overdraft on the book. The overdraft, $827.24, had been added into the $17,500 note on the 12th; out of that $827.24, placed to my credit July 13th, I got $230.50. The $525 calculated into the Mason note was paid by the check offered in evidence, and also shown by the draft.

17 By Judge GIBSON: I can say right now, if that is a mistake it will be corrected whether you amend your answer or not.

The WITNESS: I have no more checks between April 1, 1893, and April 30, 1896, than those introduced in evidence. The checks and statements together cover the items checked out of the bank between those dates.

On July 1st, 1893, according to the pass book, I am indebted to the bank on overdraft, $435. I always made it a practice, before I overdrew, to see an officer of the bank, usually Mr. Seeger, and get permission to overdraw, when I was forced to have money. That overdraft was by permission of the bank. Interest charged July 31st, 1893, $4.49, is computed at about 12 per cent. per annum, or one per cent. a month. The interest charged August 31st, 1893, is in the neighborhood of 12 per cent.

The first deposit made by me in the bank, according to my books, is dated February 15th, 1895, for money that I borrowed from Mr. Scruggs through Mr. Seeger, $1750. I did not deposit any more money in the bank until February 15th, 1895; I was very short of money all that time.

These items, dated July 31st, August 31st, September 30th, October 31st, November 29th, and December 30th, 1893, January 31st, February 28th, March 31st, April 30th, May 31st, June 30th, July 31st, August 31st, September 29th, October 31st, November 30th, and December 31st, 1894, and January 31st, 1895, were all charges for interest on the overdraft of $435.46. These vouchers were returned to me in the regular course of business with the bank, and charged up in my account against me. There was no agreement of any kind by which the bank was authorized to charge me any particular amount of interest on these overdrafts, and the charges run from one per cent. a month to over one per cent. a month.

All those checks for the interest were counted in the overdraft in calculating the $17,500 note, so that the total of that overdraft is

the original principal amount overdrawn, including these interest charged checks.

The $2,500 note of October 1st, 1895, was calculated in this way: Mr. Seeger and I sat down to make this note; we calculated among ourselves the amount of money needed to pay taxes with, and such things, and figured it up and he went to the book to see how much I was overdrawn and figured the thing up and wrote out a note for $2,500, and paid my overdraft out of it, and gave me credit for the balance of the money which I used in the payment of taxes on the property on which they held the mortgage. My overdraft on the 1st of October was $909.87. On September 30th, 1895, I was overdrawn then sufficient for them to charge me $1.55 on my overdraft. They carried it down and calculated it in this $909 87. And September 1st my account was overdrawn $167.30. This was figured in at a little better than 12 per cent. per annum.

By Judge GIBSON: I suppose it would be conceded that the $20,000 note, the one in suit in this action, and the $2,000 note in suit at Carrollton is a part of one and the same transaction?

By Mr. GARNETT: Yes, we concede that.

By the WITNESS: The items entering into the note sued on and the $2,000 note in suit in Carrollton are composed of the $17,500 note with interest on it at 7 per cent. from its date down to the making of the two notes for $20,000 and $2,000, together with the $2.500 note, with interest on it from its date to the date of the $22,000 transaction, at 7 per cent. interest, with the overdraft of $919.90 added in, making $22,000, less $2.42, which appears on my pass book. This transaction took place on the date of the $22,000 transaction. From the pass book, on April 29th, 1896, the date of the $20,000 and $2,000 notes, or the next or the second day afterwards, my book was balanced, and it shows $2.42. It shows "$922.32," which includes this overdraft. They put that there to get the overdraft off of the books. The overdraft calculated
18 into this indebtedness was the principal overdraft, together with part of the interest checks which we have talked about.

Counsel for plaintiff asks that the checks shall be separated, because defendant could not get credit for these things being charged three or four times in this statement.

By the REFEREE: I think the answers heretofore have been that the interest checks that were put into these various notes were all those that preceded in date the making of the note; and when the next note was made, they included those which were between the date of the former note and that note. For instance, they make a note of $2,500, and up to that time certain interest checks have been returned, and, as I understand his answers, that $2,500 note includes the amount of the original overdraft and the interest checks that up to that time had been made.

The WITNESS: Yes, sir.

The REFEREE: And then, subsequently, there was another note of $17,500, and then such interest checks as had been issued between

the date of the former note and that date were included in that $17,500 note, and, when the $22,000 transaction came up, then the interest notes which intervened between the making of the $17,500 note and the $22,000 transaction were put in. That is my understanding of his answer.

The WITNESS: On April 29th, 1896, the overdraft was $919.90; on January 1st, 1896, my overdraft was $585.69. On January 1st I made a check for $298.35, which overdrew my account still more, and on January 31st I am charged interest on my loan or overdraft, $8.83, and on February 29th I am charged $8.62 for interest again on that same overdraft, and on March 31st, 1896, I am charged $9.31 interest for that month on the overdraft, and on April 30th I am charged $9.10 interest on the $919.90, and on April 29th I make this $20,000 note, and this $919.90 is charged into that, and that balanced my account by making $2.42 to my credit. Mr. Seeger made that figuring; it came so near being $22,000 even money, there was $2.42 appeared next day on my book, the balance that I had to my credit.

This overdraft of $919.90 is composed of principal overdraft, and monthly interest at the rate of 12, or so, per cent. per annum, sometimes running a little more, and that was put into the note now in suit. They have been paid these "charged checks," as shown in evidence—only, as already stated, by having them embraced in my notes, and these amounts are still carried in the notes now in suit and have never been paid except by being charged into these notes.

The day the $17,500 note was made, Mr. Seeger and I met in the bank and sat down together by his desk and he took the Mason note and I allowed him to do all the figuring, and he calculated the interest for the Mason note of $15,000, with the semi-annual interest coupon of $525, and then he charged interest on that interest, $18.35, and the second coupon of $5.25, with interest $37.39; coupon again of $525, and interest on the total amount, which was $1,630.76. The total interest that they charged me was $1,630.76. Now, the principal note of $15,000 added to that makes $16,630.76. Now, then, Mr. Seeger charged interest, if I remember right, on $16,630.76 for 13 days, from the 29th day of June, 1895, to the date of the $17,500 note. The 29th of June being the semi-annual date, the balance would be 13 days. He reckoned interest on the whole thing for that 13 days, called it $42 and counted it in, making the $16,672.76. Now, my overdraft, added to the amount of that $16,672.76, makes a total of $17,269.50, with a balance to my credit of $230.50, making $17,500, the amount of the note. That is the way Mr. Seeger figured it. That is compounding interest on interest—once, twice, three times.

I think at the times of those transactions Mr. Seeger was president of plaintiff bank. He is cashier now, as I understand it, and at all the times that these notes were figured he was either cashier or president. He was familiar with the business of the bank. I think he had been connected with it since its organization. I know of the bank having charged these one per cent. a month charges on

overdrafts any time I would be overdrawn, all the time that I have been doing business there with it.

19 Cross-examination by Judge GIBSON:

The WITNESS: The bank bought the I. B. Mason note as an investment. I owed the note at the time and did not have the money to pay it, and felt safer for the bank to own it than the party who owned the note for the reason that the bank agreed to give me time and wait until I could sell property enough to pay it off, and they held it in the meantime as an investment, and took the interest, believing my note to be good.

By the REFEREE: Judge Gibson asked you if you requested the bank to buy this note?

The WITNESS: I don't know whether I could say yes or no to that. I was glad at the time to find anybody to buy it—the bank, or you, or anybody else who would give me time to pay it off. My attorneys, Mr. Ballingal and Mr. Botsford, wrote a second deed of trust on this property for $500, and Mr. Ballingal loaned me the money at that time, took the note and went down and sold it to Mr. Seeger in the bank, and Mr. Seeger gave him credit for the $500. After Mr. Seeger got that note, he went down to Mr. Dean and demanded this $15,000 note on the part of the bank, and Mr. Dean then told me why he wouldn't give it to him before. I don't remember the date of the purchase of the I. B. Mason note. There was one unpaid coupon on it, and the bank bought it also. I paid for it at the time. I don't remember to have paid anything more on the Mason note from the time the bank purchased it down to the making of the $17,500 note, except the check to Mr. Campbell. On October 29th, 1892, I gave a check to S. W. Campbell, cashier, for $796.69; as I remember, that was for the interest up to that time. I think this paid my interest up to—that is the only interest I remember to have paid—up to December 29th. I have a slip that will explain better than I could do it. (Reading)

"Citizen's national bank, Kansas City, Missouri, October 29, 1892.

Debit, Donnell note	$15,000
Coupon	525
Interest	271.69"
Making a total of	"$15,796.69"

I paid the Campbell draft with the check I gave Mr. Seeger when I got the Scruggs money. The only interest that I can remember of paying outside of that is what was included in the $17,500 note, if you call that payment. I don't know whether the check dated June 30th, 1893, (1894), for $525 is for interest or what. This is the check I gave at the time I got the Scruggs money. I don't know to what time the draft of June 30th, 1894, paid interest on the I. B. Mason note. After June 30th, 1894, I don't remember to havemade

any payments except as included in the note. In the middle of the year 1895, when the $17,500 note was made, we had no further conversation than sitting down with Mr. Seeger at his desk and he figured up everything that was due, and embraced the whole thing in this $17,500 note and handed it over to me to sign, and I signed it, I have a memorandum made by Mr. Seeger at the time.

Said memorandum was introduced in evidence under mark "Exhibit 36," and is in words and figures as follows:

"EXHIBIT 36."

Deposited with Citizens national bank by M. S. C. Donnell, Kansas City, Missouri, July 13, 1895.

	Dolls.	Cents.
Currency		
Gold		
Silver		
Checks as follows:		
New note	$17,500.00	
Less old note and int.	**16,672.76**	
	827.74	

Duplicate,
W. H. SEEGER, *C.*

(Endorsements.)

Note, 15,000 and int. 7 per c. from December 29th, 1893, semi-annual int. due June 29, 1894	$525.00	
20 **Int. to December 29, 1894**	**18.37**	
Semi-annual int. due Dec. 29, '95 ('94)	525.00	
Interest to June 29, '95	**37.39**	
Semi-annual, due June 29, '95	525.00	
	1,630.76	
Note	15,000.00	
Amount due June 29, '65	16,630.76	
Int. to July 12, '95	**42.00**	
	16,672.76	
Overdraft	**596.74**	
	17,269.50	
Bal. credit ac	230.50	
Amount new note	17,500.00"	

The WITNESS: At that time I had placed to my credit $827.24. When that was placed to my credit as against the overdraft, it left a net surplus credit of $230.50. The interest charge of $18.37 was just compounding interest at 7 per cent., and the charge of $37.39 was the same way—interest on interest. I saw Mr. Seeger write the slip and he gave it to me for my information, and I read it after I went home. I saw and understood, as the thing took place right then between us, and I knew what was being done. I never asked Mr. Seeger at any time what he was doing. I presume I knew he was charging compound interest. When I gave the $17,500 note I knew exactly what went in to it. I made no objection. The $42 item was interest on the total amount of interest, added to the principal note of $15,000 for 13 days. I think the $42 is the interest on the Mason note from June 29, 1895, until July 12th, 1895. He has compounded, charging interest on the three semi-annual interests before. It is charging interest on $1,630.76. I don't know when the money represented by the draft of June 30th, 1894, was actually paid. I remember to have been at the desk with Seeger the day I got the Scruggs money, and I remember of seeing him figure upon the back of it, and scratch that out, and I think he took that check from me right there for $525, and passed that right over. I am not clear whether that paid interest due December 29th, 1893, or not. I had no understanding about the payment of the penalty on the overdraft at any time. I knew all the banks were in the habit of charging interest on overdrafts. Some charge more and some less. From July 1st, 1893, until February 18, 1894, I had no money in the bank—was overdrawn. I did not pay the overdraft on February 15th, 1895. On February 15th, 1895, I borrowed from Mr. Scruggs $1,750.00; it was entered on my pass books and on my own account. It was put to my credit for a special purpose, not to pay the overdraft. I went to Mr. Seeger and told him how I had been sued on tax bills. Mr. Windiate had several suits against me on tax bills, which my checks showed were paid. I paid Mr. Windiate one check for $52.75 and one for $105.92 for tax bills, having explained to him (Seeger) I had to have money to take care of those tax bills. If I remember right it was on the property they had a mortgage on; we were all interested in having them cleared up. Another check was to T. S. Case, $19.13. I borrowed this money from Mr. Scruggs, and instead of taking it and going and paying those debts with it, I placed it in the bank to my credit to draw out to pay those debts I had to pay, and the overdraft stands on the first day of February, $527.48, and on the first of March, $524.30.

By the REFEREE: I understood you were to be entitled to draw all that money out?

A. Yes, sir.

Q. So what you did, don't make any difference?

A. Yes, sir; instead of taking the money and going and paying the debts, I let it go through the bank, but I made a mistake in giving the checks, I see.

Q. Well, the checks are not material; you say you were to have the right to draw the money out?

A. Yes, sir; and did not apply it to the payment of the overdraft at that time, because I was short of money, and unable to sell any property or get any money out of it.

On October 1st, 1895, I made a note for $2,500. I got the money on that date in payment of this note. That loan on that day is entered in my book. It was understood before the note was signed that the overdraft was counted into it. I haven't got the $2,500 note of October 1st, 1895, and the $17,500 note of July 12th, 1895, with me. If I mistake not they are attached to the papers in
21 Carrollton. The two notes, one of October 1st, 1895, for $2,500, and the other for $17,500, were both paid and surrendered when I made the $2,000 and the $20,000 note on April 29th, 1896. The first time anything was compounded on me was November 30th, 1892, when an interest check was charged against me for $1.70—the first time any compounding took place between me and the plaintiff; that entered into the $17,500 note of July 12th, 1895—was done July 12th, 1895. That was the first time any compounding was done, and settled into that note as far as I know. The only place the overdraft showed so anybody would understand, is from the vouchers I received when I had my book balanced, because then the whole thing was put in one item on the pass book, but it did not show what it was composed of, and it was added into the amount of my debit on the pass book. I think there was an endorsement on the back of the note; I signed it without paying any attention to it, because at that time anything that Mr. Seeger asked me to sign, I signed, without hardly looking at it. In the answer to the Carrollton case, I said: "That upon the making of the said $17,500 note, said Mason note was retained by the plaintiff and held as security for the payment of the said $17,500 note." I did not consent to the bank's retaining it as collateral security, because it never had been submitted to me for my consent. I signed the collateral agreement on the back, but did it without reading it, and without knowing what it was. I can read and write and understand the English language. Mr. Fitzhugh did all the business with me in regard to this money since he became president. Very little passed between me and Mr. Seeger about it. I did not pay either of the notes because I didn't have the money. My attention was first brought to the usury about the time of the beginning of this suit. I commenced to look at my papers, checks and accounts. It hadn't occurred to me before with a view of resisting it. I knew bankers were in the habit of charging on overdrafts, as a general thing, of course. Might allow some customers to overdraw and not charge.

I don't remember to have made any payment on either of the notes, the $20,000 note or the $2,000 note. I remember that one of the three notes that I gave to Mr. Seeger — for the purpose of negotiating and placing the money to my credit to enable me to pay my debts to them and everybody else. One of those notes was secured by this property that I sold here recently, and to release the prop-

erty and get the thing closed up I allowed the parties that was paying me money to pay $5,500 of the money into the bank and ordered them to release the mortgage without instructing them what to do with the money. I owe the bank nothing outside of those two notes. I do not claim now and I do not admit that I owe them those notes. I ordered the parties to pay it to them that they might release this property so as to close up the deal without any instructions what to do with it. I never ordered the application of that money in any respect that I know of.

In the answer filed at Carrollton, July 15th, 1897, I stated: "That the amount of legal and illegal interests on the said Mason note up to the date of said $17,500 note and said other notes to this date is more than the sum of $2,750."

That is correct; it was more. We knew at that time, or believed it at the time to be more than that amount. My deposition was taken December 10th, 1897. I testified that the legal and illegal interest, with the Wollman attorney fee of $300, amounted to $4,357.69; taking out the attorney fee it would be about $4,057.69 more or less. At Carrollton we hadn't gone into the details so much as we did afterwards. In the amended answer we claim $4,500 and something, about that amount. It may be more or less. We hadn't figured it minutely when at Carrollton.

In my deposition last month this question was asked and this answer made: "Q. Do you now tell us, with your recollection refreshed by the Mackenzie suit, that you never at any time or on any occasion requested Mr. Seeger to charge you interest on interest that you had not paid him when due? A. Mr. Seeger had always understood from me that he was at liberty to charge me for the bank or anybody else that I owed that he had anything to do with; that he was at liberty to charge whatever was right; if it was right for him to compound interest for him to do so."

I had a check here yesterday, I believe, pinned to a little blue slip for $796.69, dated October 29, 1892. It might be that it was given to the bank then to close up the transaction in that way so that the bank and I would start out that day with $15,000 "flat," as we call it.

22 Re-direct examination by Mr. GARNETT:

The WITNESS: At the time I received the $1,750 loan from Mr. Scruggs, I already had drawn money from Mr. Seeger on account of the Scruggs business by giving my due bills and he had no security for that. Now, then, when it got up to—it was over $672.12—that was the amount that I owed Mr. Scruggs, if I remember right, that took up the small due bills that were advanced me previously but they had no security for it. That was on February 15th, 1895; at the same time before I left the desk Mr. Seeger figured the amount of money I had to pay Mrs. Wagner through him—he was her agent and had my note there and held it on her behalf. That had to be paid to save the property that the note was secured by, which

was $544.80. Then I owed this $525 interest to the bank. Mr. Seeger wrote the check himself right there and then and I signed it—three of them. Those three checks were written by him; they amount to $1,741.92.

Thereupon the Mason note was offered by the defendant in evidence and marked "Exhibit 40," and is in words and figures as follows:

"EXHIBIT 40." (I. B. Mason Note.)

STATE OF MISSOURI:

Real Estate Bond.

"KANSAS CITY, MISSOURI, *July 29th*, 1886.

Three years after the date hereof, for value received, we promise to pay to the order of I. B. Mason the principal sum of fifteen thousand dollars, lawful money of the United States of America, with interest thereon at the rate of 7 per cent. per annum until due, payable semi-annually on the 29th days of January and July in each year, according to the tenor of six interest coupons for $525 each, bearing even date herewith, hereto annexed. Both principal and interest payable at the Citizens national bank. And if default be made in the payment of any part of said money, either principal or interest, when the same becomes due and payable, then all of said principal and interest shall, at the option of the legal holder or holders hereof, become at once due and payable without notice. All homestead exemptions and stay laws are hereby expressly waived.

It is further agreed and declared that this note and the coupons hereto attached are made and executed under and are in all respects to be governed and construed by the laws of the State of Missouri and are given for an actual loan of $15,000.

This note and these coupons are to draw 7 per cent. interest per annum after maturity and are secured by deed of trust of even date herewith on real estate.

The time for the payment of this indebtedness may, at the option of the makers thereof, be extended for three years longer, from July 29, 1889, to July 29th, 1892, provided they give said payee or his assigns notice thereof in writing six months previous to July 29, 1889.

No. 26,372. CATHERINE E. DONNELL.
Due: Demand M. S. DONNELL.

(Endorsements.)

Interest paid to October 29th, 1892.
Interest paid to December 29, 1892.
Interest paid to June 29, 1893.
Interest paid to December 29, 1893.
Without recourse.

I. B. MASON."

The WITNESS: There was one coupon attached to this note when Mr. Seeger bought it and I paid that coupon off, and if I remember right, the payment of it was embraced in the check to Mr. Campbell at that time.

By Judge GIBSON: I guess there is no question between us on that. This Campbell check of October 29, 1892, took up all the coupons off the note and all the interest so that Donnell and the bank started out with a clean $15,000 on that day, and that some money over and above the $15,000 went to Mr. Dean for Mr. I. B. Mason.

The WITNESS: The memorandum made July 13th, 1895, is in Mr. Seeger's handwriting, was given to me by Mr. Seeger at the same time that I signed the note.

There was a contest, with reference to the validity of the
23 note, for $6,000 secured by deed of trust on the property sold in January in which the order was given on the Citizens national bank to turn the same over to the Home Realty Company.

And thereupon defendant offered in evidence his answer in the cause pending in the circuit court of Carroll county between the Citizens National Bank, plaintiff, and M. S. C. Donnell, defendant, filed July 15th, 1897. Said answer was received in evidence and marked "Exhibit 41," and is in words and figures as follows:

(EXHIBIT 41.)

Answer (in Carroll County Case).

By leave of court defendant files this his amended answer herein and says:

1st. He denies each and every allegation in plaintiff's petition contained.

2nd. For further answer defendant says that on or about 14th day of October, 1892, plaintiff purchased of one I. B. Mason a negotiable promissory note theretofore made by the defendant to said Mason as payee in the sum of $15,000, bearing 7 per cent. interest; that thereafter, on the 12th day of July, 1895, defendant made and delivered to the plaintiff his promissory note for $17,500 as additional security for the amount of said Mason note and for the purpose of evidencing the same debt as was evidenced by the said Mason note, and also certain amounts of legal interest due on said Mason note together with certain amounts of interest on said Mason note over and above the rate by law collectible or demandable of defendant thereon. That a portion of the amount represented by the difference between the said Mason note and said $17,500 note was illegal, unjust and usurious interest calculated into and added to the said $15,000 note, which said amounts it was and is unlawful for plaintiff to demand, exact or collect from defendant.

That upon the making of the said $17,500 note, said Mason note was retained by plaintiff and held as security for the payment of said $17,500 note, both of said notes representing one and the same

debt. That thereafter defendant made and delivered his promissory note to plaintiff dated October 1st, 1895, for $2,500. That thereafter said $17,500 note and said $2,500 note were merged into two notes, one for $20,000 and one for $2,000, making defendant's nominal indebtedness to plaintiff $22,000. That the difference between the said $20,000, represented by said two notes of $17,500 and $2,500, and said $22,000, evidenced by said two notes, one for $20,000 and one for $2,000, was in whole or in part illegal, unjust and usurious interest which it was unlawful for plaintiff to demand, exact or receive. That the amount of legal and illegal interest on the said Mason note up to the date of the said $17,500 note and said other notes down to and including said two notes aggregating $22,000 to this date is more than the sum of $2,750; that the $2,000 note herein sued on is the $2,000 hereinabove mentioned. That the illegal, unjust and usurious interest included in said notes as aforesaid and now herein demanded of defendant, precludes plaintiff from collecting any interest whatever on said $20,000 and said $2,000 notes, and that the amount thereof as above is sufficient to and does extinguish and cancel, and relieves defendant of any liability for said $2,000 note.

3rd. Defendant further says that on September 15th, 1895, defendant made to William H. Seeger, as payee, his three certain promissory notes, one for $12,000, one for $10,000 and one for $8,000, payable five years from date, bearing 6 per cent. per annum interest, and each secured by a separate trust deed to W. Ewing Hall, as trustee. That at said date defendant owed said Seeger nothing; said notes were not given to secure any debt, and were and are wholly without any consideration in fact or in law, and then had and now have no force or effect whatever, and did not then and do not now in law or in equity bind or obligate defendant in any way whatever, but were made for the purpose of having said Seeger sell the same to whomsoever would purchase the same, and if so sold for value by said Seeger, said notes were to become binding and obligatory upon defendant but not otherwise, and said Seeger was to place the proceeds arising therefrom to defendant's credit in the plaintiff bank, and they were not made or delivered to said Seeger for any other purpose whatever, and they were received and taken by said Seeger for that purpose and upon that understanding and agreement, and for and upon none other. That in disregard of the purpose and agreement for which said notes were made and delivered to said Seeger as aforesaid, he thereafter, without consideration, delivered and turned over said notes to plaintiff without the knowledge or consent of defendant.

24 That on April 29th, 1896, defendant made his two certain promissory notes to plaintiff, payable on demand, one for $20,000 and one for $2,000, bearing eight per cent. per annum interest, said note for $2,000 being the note sued on in plaintiff's petition herein. That at the date aforesaid, plaintiff having got possession of said three notes for Seeger as aforesaid, without consider-

ation, endorsed upon each of said notes *from* $20,000 and for $2,000 aforesaid, the words and figures following, to-wit:

"This note and other indebtedness I now owe or may hereafter incur to the said bank is secured by the following collateral notes and mortgages: One $15,000, dated July 29th, 1886, and notes $12,000, $6,000 and $10,000, respectively, dated September 14th, 1895, all made by M. S. C. Don-ell *et al.*, with full authority to sell the same at public or private sale, without notice on non-payment of this note or any other indebtedness to the bank."

M. S. C. DONNELL.

Which endorsement defendant signed whereby defendant and plaintiff agreed that plaintiff should hold the said three notes with authority to sell the same as in said endorsement stated, and upon the condition and for the purpose therein stated and not otherwise.

That thereafter, and prior to the filing of this present suit; plaintiff asserted title in and to and ownership of said $12,000, $10,000 and $6,000 notes, claiming that the same were valid, subsisting and enforceable obligations as against defendant in plaintiff's favor, and now claim to be the holders and owners thereof and that it is entitled to foreclose the trust deeds securing the same and therein and thereby, prior to the filing of its said petition herein, and prior to the maturity of the $2,000 note herein sued on, and prior to the maturity of the note herein sued on, plaintiff converted said notes to its own use and benefit, whereby plaintiff became liable and bound to pay defendant the face value of said notes, to-wit., the sum of $28,000, for which defendant asks judgment against plaintiff with interest thereon from September 14th, 1895, at the rate of six per cent. per annum together with all costs.

4th. Defendant further says that on September 14, 1895, defendant made to William H. Seeger, as payee, his three certain promissory notes, one for $12,000.00, one for $10,000.00, and one for $6,000.00, payable five years from date, bearing six per cent. interest, and each secured by a separate trust deed to W. Ewing Hall as trustee. That at said date defendant owed said Seeger nothing. Said notes were not given to secure any debt, and were and are wholly without any consideration in fact or in law, and then had and now have no force and effect whatever, and did not then and do not now, in law or in equity, bind or obligate the defendant in any way whatever, but were made for the purpose of having said Seeger sell the same to whomsoever would purchase the same, and if so sold for value by said Seeger, said notes were to become binding and obligatory upon defendant but not otherwise, and said Seeger was to place the proceeds arising therefrom to defendant's credit in plaintiff's bank, and they were not made or delivered to said Seeger for any other purpose whatsoever, and they were received and taken by said Seeger for that purpose and upon that understanding and agreement, and for and upon none other. That in disregard of the purpose and agreement for which said notes were

made and delivered to said Seeger as aforesaid, he thereafter delivered and turned over said notes to plaintiff without the knowledge or consent of defendant. That on April 29th, 1896, defendant made his two certain promissory notes to plaintiff, payable on demand, one for $20,000.00 and one for $2,000.00, bearing eight per cent. per annum interest; said note for $2,000.00 being the note sued on in plaintiff's petition herein. That at the date last aforesaid, plaintiff having got possession of said three notes from said Seeger as aforesaid, with notice of the terms and conditions under which said Seeger held said notes and without having given any consideration therefor, endorsed upon each of said notes of $20,000.00 and for $2,000.00 aforesaid, the words and figures following, to-wit:

"This note and other indebtedness I now owe or may hereafter incur to said bank, is secured by the following notes and mortgages: One $15,000.00, dated July 29th, 1886, and notes $12,000.00 and $6,000.00 and $10,000.00, respectively, dated September 14, 1895, all made by M. S. C. Donnell *et al.*, with full authority to sell the same at public or private sale without notice for non-payment of this note or any other indebtedness to the bank.

M. S. C. DONNELL."

Which endorsement defendant signed, whereby defendant
25 and plaintiff agreed that plaintiff should hold the said three notes with power to sell the same as in said indorsement stated, and upon the terms and conditions and for the purpose therein stated and not otherwise. That thereafter and prior to the filing of this present suit, plaintiff asserted title in and to and ownership of said $12,000.00, $10,000.00 and $6,000.00 notes, claiming that the same were valid, subsisting and enforceable obligations as against defendant in plaintiff's favor, and now claims to be the owner and holder thereof, and that it is entitled to foreclose the trust deeds securing the same, and therein and thereby, prior to the filing of its said petition herein and prior to the maturity of the note sued on herein, plaintiff converted and appropriated said notes to its own use and benefit. That plaintiff, without authority from defendant or right to do so, and having no right or title to said note and no right to the possession thereof other than is set out and contained in said endorsed agreement, but wrongfully pretended to own said notes and in violation of said endorsed agreement, and with the intent to fraudulently, illegally and unjustly to deprive defendant of the land described in said trust deeds, ordered the trustee, in said trust deed named as aforesaid, to advertise and sell the said lands ostensibly under the powers therein contained, claiming to be the owners of said notes and entitled to foreclose said trust deeds. That the lands described in said trust deeds are reasonably worth from $60,000.00 to $75,000.00; that if said trustee is permitted to make sale thereof at the instance and direction of the plaintiff, as said trustee is now threatening and attempting to do, said lands will be

sacrificed, the title thereto will thereby become clouded and involved, vexatious and costly litigation will thereby be precipitated and made necessary, and defendant will be unjustly harassed and annoyed and irreparably injured and damaged. That said trustee at plaintiff's instance and request has advertised said lands to be sold at public outcry ostensibly under the provisions of said trust deeds, on July 19, 1897, claiming and asserting that a default has occurred thereunder, because of an alleged failure on defendant's part to pay interest on said notes and principal thereof, which said plaintiff and said trustee claims has become due in consequence of non-payment of interest, whereas in law and in fact neither the principal of said notes or any interest thereon has become due or even can become due or demandable unless and until said note shall be sold for value under the terms and conditions of said endorsed agreement, nor can the principal thereof become demandable until the face maturity of said notes, nor can said notes begin to bear interest until they are so sold for value.

That the interest demanded by plaintiff upon and in respect of said two notes, aggregating the sum of $22,000.00, is in whole or in part illegal, unjust and usurious, and defendant is, in the suits brought by plaintiff upon said notes, resisting the collection of any interest upon said notes because the same is illegal, unjust and usurious. That if plaintiff is permitted to sell said lands under said trust deeds for non-payment of interest on said three notes, aggregating $28,000.00, it will greatly increase the amount of illegal, unjust and usurious interest attempted to be collected by plaintiff from defendant in respect of his real indebtedness, if any, upon said notes for $22,000.00 in the aggregate. That plaintiff holds possession of said three notes aggregating $28,000.00; also said two notes aggregating $22,000.00; also a judgment lien in its favor for about $8,000.00 upon property owned by defendant; also a note for $15,000.00, signed by defendant and wife, payable to I. B. Mason, being the same note mentioned in the endorsement hereinabove set out, said judgment and note aggregating $73,000.00, upon each of which sums plaintiff claims to be entitled to demand and collect, and is attempting to collect, interest at not less than the legal rate on any of said sums, whereas in truth and in fact the total indebtedness of defendant to plaintiff, if any, is much less than $20,000.00, thereby greatly increasing the amount of unjust, illegal and usurious interest demanded by plaintiff of defendant. That unless restrained said trustee will sell said lands pursuant to said advertisement. That defendant owes plaintiff nothing in respect to said notes, has received no consideration whatever therefor; the same have never been sold by plaintiff pursuant to said endorsement for value or otherwise, and plaintiff has no right to sell said lands for any purpose whatever; that no demand was made upon defendant by plaintiff for the payment of said three notes, aggregating $28,000.00, prior to said advertisement nor at any other time. That plaintiff has sued defendant upon said note of $20,000.00 in the circuit court of Jackson county, Missouri, and upon said $2,000.00 herein, and

that both of said suits are now pending, and defendant denies and will continue to resist the right of plaintiff to recover the face of said two notes, and until said two suits are
26 heard and determined finally, the real indebtedness of defendant to plaintiff in respect of said two notes cannot be ascertained. That a sale of said lands under said trust deeds would greatly injure and damage defendant under said circumstances. That the lands described in said trust deeds are as follows, to wit., securing said $12,000 note the following real estate in Jackson county, Missouri, to wit: All of lots 1, 2, 3 and 4, in block 4, of A. J. Lloyd's sub-division of the east half of the southeast quarter of section 7 (less 12 acres from the north end), in township 49, range 33 W., as the same are marked and designated on the plats of said subdivision; said land being covered by the deed of trust filed for record in the office of the recorder of deeds of Jackson county, Missouri, at Kansas City, on 28th day of January, 1896, and recorded in Book B No. 606, at page 68. That the lands covered by said $10,000 deed of trust, which was filed for record in the office of the recorder aforesaid on the 28th day of January, 1896, and recorded in Book B No. 606, at page 69, were the following described real estate in Jackson county, Missouri, to wit: All that part of lots 1 and 2 lying south of the Belt Line railway and in block 10 of A. J. Lloyd's subdivision aforesaid. That the real estate covered by the said $6,000 deed of trust, which was filed for record on January 28th, 1896, and recorded in the office of said recorder in Book B 606, at page 70, were the following lands in Jackson county, Missouri, to wit: All of lots 4 and 6, and all of lot 5 except 80 feet by 112½ ft. out of the west side heretofore sold, all in Col. E. M. McGee's subdivision of the S. W. quarter of the northeast quarter of section 8, in township 49, range 33, west, as the same are designated on the recorded plat of said subdivision. The plaintiff is without adequate remedy at law and can have adequate relief only in equity. Wherefore he makes this, the fourth count of his answer, a cross-bill against plaintiff and prays the court:

1. That a temporary restraining order issue from this court restraining and enjoining plaintiff, its officers and agents, W. Ewing Hall, trustee as aforesaid, and each and every of them, from further advertising, and from selling or from in any way interfering with any of said lands, or any part thereof, until the matters and things herein contained are heard and determined.

2. That said W. Ewing Hall, trustee, be made a party to this defendant's cross-bill.

3. That unless and until plaintiff pay over to defendant the face value of said three notes, viz., $28,000 and interest, less whatever sum shall ultimately be found to be due to plaintiff from defendant in respect of said two notes for the aggregate of $22,000, plaintiff and said parties be respectively restrained and enjoined from collecting or attempting to collect any interest or other demand based upon or growing out of said $28,000 notes, or from attempting in

any way or for any purpose to sell said lands mentioned in said trust deeds.

4. That upon a final hearing thereof, plaintiff, its officers and agents, W. Ewing Hall, trustee, and each and every of said parties be perpetually restrained and enjoined from selling or attempting or threatening to sell said lands, or any part thereof, under the said trust deeds, or from interfering with the same in any way or for any purpose or upon any pretext whatever unless and until plaintiff shall actually pay the face value of said three notes and interest as prayed in the third prayer hereinabove set out.

5. That plaintiff be perpetually restrained and enjoined from selling, transferring by endorsement or otherwise, hypothecating, or from in any manner disposing or parting with the possession or altering the present shape or condition of either or all of said three notes hereinabove mentioned, aggregating $28,000, in any other way, manner of method, or for any other purpose whatever except as provided in and by the terms of said endorsed agreement, and for the purpose therein stated, and at not less than their face value and that this court order, adjudge, decree and declare that the true meaning, intent and purpose of said endorsed agreement was and is that plaintiff hold said notes only for the purpose of selling the same at not less than their face value for the purpose of applying the proceeds thereof to the payment of whatever amount plaintiff may, at the time of said sale, justly and legally demand of defendant in respect of said $22,000 in notes, and for no other purpose whatsoever, and that unless and until plaintiff shall pay to defendant said $28,000, less plaintiff's said just demands against defendant, if any, as in defendant's third prayer herein prayed, plaintiff and each of said parties hereinbefore mentioned be perpetually enjoined and restrained as aforesaid.

6. For such other further and general relief as the facts justify and as equity may deem fit and proper.

(Signed) M. S. C. DONNELL.

Said answer was verified by defendant.

27 The WITNESS: We had no agreement in regard to the payment of the $6,000 note.

Re-cross-examination by Judge GIBSON:

In reference to the application of the $5,500 paid January 25th, 1898, to plaintiff, there was no agreement only the written copy which I introduced here. That is the only order or authority to pay this money to the bank. In this agreement that I signed I made no order particularly as to what that should apply on, but I presume it would be perfectly right to apply it on any legal debt that will be shown that I owed when that was done; but just now, as I understand it, the thing stands disputed. The only writing about that was that which bears date January 24th, 1895. I signed the endorsement on the $20,000 note and the $2,000 note. I am not

positive when they were endorsed. I presume they were put there when the notes were written. The best of my opinion is they were put there April 29th, 1896. I do not remember of being called on to sign at any other time. The Scruggs loan is entered as of February 15th, 1895. I believe I got the money when those three checks were written, because I closed up the whole thing with Mr. Seeger before I left, and because I borrowed the money from Mr. Scruggs for the purpose of taking up those three checks that he wrote then and there. I merely signed them. All I remember is fixing it up with Mr. Seeger; he fixed the whole thing up and figured the amount I had to pay. He wrote out three checks covering the whole thing. I never examined "Exhibit 36" until after this suit was commenced. I did not object to it until long after the suit was commenced. I sat by Mr. Seeger when he did all this figuring and marked down the items. I suppose that I understood what they meant, but I did not figure—did not go over his work with him to see everything was correct or not. Didn't question his work. I took it for granted what he did was correct, without any knowledge on my own individual part of the matter. I knew from seeing him figure those things, that putting in those small amounts, I presume they were compounding interest on interest and at the time I signed the $17,500 note, but I never examined particularly. I did not know what else it could be unless it was that. I did not ask him what it was, I guess it to be that. At the time I signed the note I relied on Mr. Seeger's figures. I intended to cover all the indebtedness I had with the bank, provided the figures were correct. If correct, it was to be a settlement of the whole transaction.

Defendant here rested his case.

Thereupon the plaintiff, by way of rebuttal, offered and introduced evidence as follows:

SAMUEL J. FITZHUGH, called as a witness on the part of the plaintiff, being duly sworn, testified as follows:

Direct examination by Judge GIBSON:

The WITNESS: I am president of The Citizens National Bank, the plaintiff in this case; have been engaged in the banking business about ten years.

Q. What is the usual custom of banks, if there is any, in Kansas City, and what has been the usual custom since 1896, in regard to charging a penalty on overdrafts at the bank?

Counsel for defendant objects to the question; that such a custom could possibly have no bearing on any issue in this case.

The REFEREE: In order that the whole matter may go to the court for ultimate decision, I will allow that inquiry to be made; but my present impression is, it would not control, whatever the law may be in that regard. The witness may answer that question subject to this objection.

The WITNESS: It is customary to charge penalties on all overdrafts.

Q. How long has that custom obtained?

A. Oh, I have known of it for eight or ten years.

Q. Well, is there any specific per cent. or anything of that kind charged, how is it in regard to its being taken and considered as a per cent., or simply as a penalty?

By Mr. FORSEE: I suppose it is mutually understood, all the way around, that the same objection is renewed.

The REFEREE: I so understood it.

A. To answer that question fully, I will say it depends a great deal on the party as to what lump sum we would charge him and also what amount he overdraws. If a party should not pay, we would not permit him to overdraw again; just simply throw
28 him out, and if he paid it all right. We discourage overdrafts as much as we can. We charge a lump sum. It can be figured in per cent., but it is a lump sum. As far as my acquaintance goes, I think that is the custom of all banks here. I have had to suffer that way myself, once or twice.

I have looked over the books of the bank, in regard to this transaction, and am familar with them. The discount ledgers are always dated whether any business is transacted on the date or not, and every date on the bank books is put down whether there has been a change in the amount or not. When a discount is made on the 29th an entry of credit might occur on the morning of the 30th. With that exception entries are made of the date of the transaction. I sent for Mr. Donnell and called his attention to the fact that his note for $17,500 on demand, dated July 12th, 1895, had no interest paid on it since the date it was made, and the $2,500. note made October 1st, 1895, had no interest paid on it, and that we were carrying it in violation of the Federal statutes governing national banks, that is, if interest is not paid, if interest is in arrears six months, it is considered bad paper and classed as bad paper, and in order to prevent instructions from the comptroller to charge it off, it is necessary for us to bring suit to collect. And in order to make that live paper, of course I first tried to collect it, and Mr. Donnell couldn't pay it; I then told him I wanted to fix the thing up in shape where he could liquidate his indebtedness to the bank and where I could handle it without criticism from the department of the Comptroller of the Currency. He agreed that that should be done, and that his indebtedness should be taken up—the two notes. I told him we would increase the indebtedness two thousand dollars, for the purpose of enabling him to pay his interest and pay an overdraft that he had. He agreed to that. I then instructed Mr. Seeger to take two notes from him, one for $20,000 and one for $2,000.00, and on demand, and for him to make those notes read 8 per cent. from date. We had been charging him but 7 per cent. before. I made them 8, simply because we were compelled to carry the indebtedness in that shape and by security that is really not in conformity with

the national banking act. We had no right to take a debt already made. I had the notes made separately, one for $2.000.00 and one for $20,000.00, with a view of disposing of the $2,000.00 note so that our bank would not carry an excess loan. 20 per cent. of the capital stock we were allowed to loan to one party but no more, which was $20,000.00, and I took the notes separately so as to be able to dispose of the $2,000.00 note on the side. The collateral was put on the back of both these notes, and a collateral clause, of course. I had examined the collateral and all that sort of business. The collateral was one deed of trust note made by Mr. Donnell for $6,000,00, secured on a certain piece of property; another for $12,000.00, and another for $10,000, and then this Mason note that has been testified about here, $15,000. They were described on the back of these notes as collateral, and signed by Mr. Donnell. Nothing enters into these notes at all; we loaned him $22,000, out of which he paid the $17,500 note and the $2,500 note and the interest on these two notes and the balance went to his credit. The $17,500 note was figured into the two notes at 7 per cent. per annum from July 12th, 1895, to April 29th, 1896—straight interest. The $2,500 note was figured at 7 per cent. per annum from October 1st, 1895, its date, until April 29, 1896. There was no compounding on that; it was straight interest. There was a mistake made by Mr. Seeger in figuring interest on this $17,500 note and the $2,500 note, but it was a mistake against the bank. Interest should have been $1,641.18 —no, I made a mistake. These were demand notes bearing interest from date. Mr. Seeger did not get enough time on the notes. The interest on those notes should have been $1,100.02, whereas his figures made $1,077.68. We gave Mr. Donnell too much credit on his account that day by $22.00. That was made against the bank on that transaction. We put to Mr. Donnell's credit that day the proceeds of the $2,000 note and $20,000 note, after his payment of the $17,500 note and $2,500 note and the interest on the same—we put to his credit $922.32. Our discount register that day shows a paid note of $17,500 and a new loan of $20,000 and $2,000 with an interest credit of $1077.68, which was a mistake as against the bank. At the time the $922.32 went to Mr. Donnell's credit, there was an overdraft on the books of $919.90. The $17,500 note and the $2,500 note, and by error only $1077.68 interest on those two notes entered into the calculation, which was the basis of the two notes of April 29, 1896. There should have been $22.34 more interest. In addition to that there was the amount that went to his credit, $922.32. Those items make $22,022.34. Nothing but cash was entered into the $2,500 note of October 1st, 1895. He is credited with $2,500, the pro-
29 ceeds of the note; that was a demand note. That went to his credit for the total amount. It was a demand note, no discount. There was not a solitary note discounted in the usual sense of discounting. Every one of them was a note that bore interest from date, and was not discounted. The original Mason note was a past due note. The indebtedness of Mr. Donnell, represented by the Mason note, entered into the $17,500 note. A mistake was

made by Mr. Seeger, from the memorandum that I see here, where he appeared to figure the interest semi-annually. The fact of the matter is it was not even paid annually. I refer to "Exhibit 36." The note was taken July 13th, 1895, for $17,500. That appears on our discount register as a loan to Mr. Donnell. The old note with interest amounted to $16,672.76, and there was put to his credit $827.24 that was a part of that note. That was one item. On the back of this it appears that Mr. Seeger had intended to figure this semi-annually, but if he did he made a mistake in the figures. The interest on the $15,000, which was a past due note when the bank took it, was paid. It was taken October 29, 1892. On that date the bank gave to Mr. Dean, of the firm of Warner, Dean & Hagerman at that time, a deposit or paid them $15,801.69. That was what the bank paid for that. Mr. Donnell gave the bank two checks, one for $766.69 and the other for $5.00, that was to pay all interest and charges on the Mason note up to that date. It did pay it. Just $15,000 stood on the books of the bank as a net entry, so that he started out straight with $15,000, and the entry was made on the back of the Mason note, "Interest paid to October 29, 1892." On December 29, 1892, Mr. Donnell gave a check on the bank for the interest from October 29, 1892, to December 29, 1892, for $175.00, which was paid by the bank on December 31st, and an entry made on the back of the note to that effect.

On June 30th, 1893, Mr. Donnell paid interest on the Mason note again—6 months' interest up to June 29th, 1893, by check on us for $525.00. The endorsement was put on the back of the note: "Interest paid to June 29th, 1893." All of these were figured at 7 per cent. straight. When the next six months' interest was due he didn't pay it—that was June 30, 1894, but on February 18, 1895, he made a check for $525.00, which was for six months' interest, which paid the interest up to December 29, 1893. The interest on December 29, 1893, was not paid, and on February 18, 1895, the interest ($525.00) was paid, which paid the interest that had been due December 29th, 1893. That left interest unpaid from December, 1893. It was July 12th when he took up this interest finally. It was only on February 18th, 1895, he gave a check that paid up to December 29th, 1893. On February 18th, he gave his check for $525.00, which paid it up to December 29th, 1893, and left standing at that time a year of unpaid interest; and from December 29th, 1893, to the 18th of February, 1895. On July 12th, 1895, settlement was made, and we loaned him $17,500.00. Then he owed a little more than 18 months' interest at that time, so that the interest compounded annually on the note, and not semi-annually, is $1,604.18, whereas Mr. Seeger and Mr. Donnell made it $1,672.00. The interest on the Mason note annually from December 29th, 1893, to July 12th, 1895, when the note was taken, together with interest on the deferred payment—that $525.00 that should have been paid December 29th, 1893, up to February 18th, when it was paid, makes the interest $1,694.18, figured at 7 per cent., compounded at the end of one year, but not compounded semi-annually. Mr. See-

ger did not make any allowance for the $525.00 that had been paid December 29th, and he had intended to pay and was not paid until February. He figured in actually $1,672.76. It makes a difference of $21.42 against the bank and in Mr. Donnell's favor.

The indebtedness of Mr. Donnell, represented by the Mason note, according as Mr. Seeger had figured it, was $16,672.76, and there was placed to his credit on that date, on the next morning, July 13th, 1895, $827.24. That is what constituted the $17,500.00 note. That is, we took a note for that and entered the note that we gave up as paid. It does not include semi-annual compounded interest on the Mason indebtedness. It includes indebtedness represented by the Mason note and the interest on the same from December 29th, 1893, to July 12th, 1895, when it was taken up and the interest on the $525.00 payment that should have been paid December 29th, 1893, to which we were entitled, and which was paid February 18th, 1895; then $828.24 was placed to his credit. The interest on the Mason note was compounded annually after one year. The interest was figured up to December 29, 1894, and it was not compounded once a year. In my calculations no overdraft cuts any figure whatever. There had been no interest paid from June 29th, 1893, and on June 30th, 1894, Mr. Seeger made a draft on Mr. Donnell for the interest up to December 29th, 1893, because the law requires us to charge a note off, if it is in arrears in interest for 6 months, or else to bring suit to foreclose. That is, this draft of Mr. Campbell, the cashier of the bank. The draft was carried in the bank drawer waiting for Mr. Donnell to take it up and he did not take it up until February 18th, 1895; with the exception of that one payment, the unpaid interest on the Mason indebtedness extended from June, 1893, until July 12th, 1895.

The penalties charged on overdrafts on Mr. Donnell's account from June, 1893, to the first day of February, 1895, amounted to $95.16. That was paid and made good February 18, 1895, by a deposit of $1,750.00. Mr. Donnell borrowed that money from Mr. Seeger—the Scruggs money—that is known as the Scruggs loan.

An overdraft is entered by just paying a man's checks and debiting him with it, and when the debit is figured the balance shows in red, or on the wrong side of the ledger; and when a deposit is made he takes it up. These overdrafts are entered on the customer's account, in which are also entered his deposits, so that when his deposits amount to more than his overdrafts, that wipes out his overdrafts.

On the morning of February 18th, his overdraft, including the penalties, was $527.48. On that morning a deposit was made of $1,750.00; that evening there was charged against his account three checks, one to Wagner and one to Scruggs and one to our bank for $525.00 which overdrew his account again that day, and the overdraft on that evening was $519.40. Either one of those checks would have made it—the $525.00 to us, or the one to Scruggs, or the one to Wagner. That was an entirely new overdraft.

The overdraft prior to that day was made up simply by the deposit

of the $1,750.00. Now, the penalties on Donnell's overdraft from February 18 to July 30, 1895, amounted to $27.34. The overdraft, figured at the legal rate of interest (6 per cent.) at the time the $17,500.00 note was taken, would have made $34.31, whereas we only got $17.10—got $17.21 too little, that is, figuring it at 6 per cent. The Mason note was bearing 7 per cent. By reason of the error in the computation which I pointed out in Mr. Seeger's figures, the 6 per cent. on that overdraft would have amounted to $13.00 less than what Mr. Donnell got the benefit of. He got more benefit than he was entitled to. In fact, on all the overdrafts figured from February 18th up to the time of the last settlement at 6 per cent. and the rate of interest the other paper drew, we failed to get within $13.00 of what we were entitled to.

On October 1st, 1895, we took a note from Mr. Donnell for $2,500.00; at that time the penalties charged on his overdraft was only $1.55 in the month of September, and he deposited on October 1st $35.00, which more than paid the penalty we had charged. That wiped out the penalty so that at the time of borrowing the $2,500.00 and giving the $2,500.00 note there was an overdraft of $268.00, but the penalty charged was only $1.55. He made the deposit himself in cash that morning, October 1st, 1895, of $35.00, and then there went to his credit the proceeds of the $2,500 note that we loaned him. The penalties on Donnell's overdraft from the first day of November to April 29th, 1896, amounted to $43.54, and the total overdraft April 29th, 1896, including penalties, was $919.90, which was made good or paid out of the proceeds which went to Mr. Donnell's credit on the $20,000.00 and the $2,000.00 notes taken on the 29th. These deposits to Donnell's credit, out of the proceeds, were entered on our books April 30th. Figuring that overdraft at 6 per cent. and figuring the note at 7 per cent.—figuring that overdraft at 6 per cent. per annum without compounding it from month to month, and charging him on the demand notes—we are still short $2.97 of getting our legal interest.

By Mr. FORSEE: All this testimony you have been giving about the $17,500 note is what you got from the books?

A. No, I got, of course, the verification of the figures on the books.

Mr. GARNETT: You know anything of it of your personal knowledge?

A. I knew nothing of it of my own personal knowledge.

Mr. GARNETT: I move that it be stricken out.

The WITNESS: I did know about the $17,500 note in his settlement when it went into the $22,000 notes.

By the REFEREE: The motion to strike out is overruled.

The WITNESS: All interest that Mr. Donnell paid was, including the credit of December 29, 1893, that was paid February 18, 1895, was all paid by check to us; that included that entry on the back of the Mason note and paid by him and paid by check.

I make the total amount that Mr. Donnell has paid us, including penalties, $2,918.03. Those penalties were almost all
31 made good by deposits of Mr. Donnell, independent of any loan from the bank. None of these penalties were figured into any of these notes. None of these penalties ever entered into any of these notes. We never took a note from Mr. Donnell putting any overdraft in it at all. We loan a man money and he puts it to his credit and we give him a deposit ticket and enter it on his book.

Cross-examination by Mr. GARNETT:

For some people we honor overdrafts and some we do not. It is a matter of whether we want to do it or not.

I became president of the bank January 15th, 1896. I was interested in the bank prior to that time but not as an officer. I knew nothing, of my own knowledge, about the making of these bank books prior to the time I went into the bank.

This statement of Mr. Seeger's, showing that an overdraft of $996.74 went into this $17,500 note, was made a long time prior to the time I went into the bank. I don't call that a statement; it is a memorandum. I think he made it; it looks like his figuring. Mr. Seeger only figured the interest here from December 29th, 1893, whereas the interest ought to have been paid from June, 1893.

Q. Will you state whether or not that memorandum is correct, that is to say if this interest was figured, as a matter of fact, from December 29th, 1893, down to July 12th, 1896, as shown on that memorandum; that the amount of interest figured there is not correctly stated as 7 per cent. per annum compounded semi-annually?

By Judge GIBSON: That memorandum shows for itself just what it is.

The WITNESS: I could not undertake to say that without figuring it over.

Q. You won't say that it is not correct?

A. I do say it is not—not from this memorandum.

The REFEREE: He is asking one question and you are asking him another. He says that those figures of Mr. Seeger's are not correct.

Q. Admitting for the sake of the argument that those figures are correct will you testify that the $16,672.76 is not the correct amount of interest and principal figured at 7 per cent., compounded semi-annually, on this $15,000 note?

A. I would not testify at all until I had figured it, whether it is correct or not.

Q. Have you figured it?

A. I have not figured that memorandum at all.

Q. Have you figured the amount of interest on a note of $15,000, beginning December 29, 1893, and running to July 12th, 1895, at 7 per cent., compounded semi-annually?

A. No.

Q. You have not figured that?

A. But I know that is wrong from the fact that the other figures are different.

Q. You know that this is wrong?

A. Yes, sir, I know that that is wrong.

Q. That is to say $16,672.76 is a wrong amount to obtain by correctly figuring the amount of interest on a note of $15,000 between the dates of December 29th, 1893, and July 12th, 1893, at 7 per cent. compound interest semi-annually?

A. Well, no; I am not prepared to answer that question; I would have to figure it to see whether that is correct or not.

The REFEREE: As I understand it Mr. Fitzhugh says he never figured on the basis of figuring from the 29th of December, 1892, therefore did not verify the figures made by Mr. Seeger on that basis; but what he contends is that taking the facts and the previous payments, the amount of interest due at the time Mr. Seeger made those figures, is not correctly arrived at by Mr. Seeger's figures.

The WITNESS: That is right.

By Mr. GARNETT: Then, as a matter of fact, you did not figure interest on this note between the dates I have indicated?

A. No, not between those dates.

Q. Your contention is that this draft that was offered in evidence here, given on Mr. Donnell, on July 30, 1894, was credited by the bank to Mr. Donnell's interest account and was not taken up until 1895?

By Judge GIBSON: June 30th.

The WITNESS: I did not say that the draft was never taken up; I said the interest was paid, but the draft never was taken up; it was merely handed back to him, and it was not stamped "paid." It is as broad as it is long.

The difference is made by figuring interest from June, 1893, up to the payment of this interest, February 18th, and then from there to July 12th. I meant including interest on the $15,000 up to July 12th, and giving him credit for the payment on February 18th of the interest. This payment of February 18th, 1895, paid the interest up to the 29th of December, 1893. It was actually paid
32 nearly 14 months after it ought to have been paid. I included interest on that $525 from the time it ought to have been paid to the time it was paid. That is the way I make the difference between this and Seeger's statement. It is as broad as it is long. When the $525 draft was given on Mr. Donnell, payable to Mr. Campbell, I don't know whether there *there* was any interest coupon standing out. I did not see the papers at that time. I am only giving you what the records of the bank show. They don't show anything about that.

We charge some men more and some less penalty on overdrafts, and some we do not charge at all; it depends upon the man—how chronic he is about it. We charge the chronic ones more. We do not want to lend money indirectly. Before I went in the bank it

loaned Mr. Donnell money, but I wouldn't. I treated him as a chronic. Since I came to the bank he has had the overdraft habit. I have testified that no overdraft went into any of these notes; I can explain to the court why I make that statement. We loaned Mr. Donnell so much money and we put it to his credit and the overdraft did not enter into his note at all. We always loaned him more money than enough to cover whatever indebtedness he wanted to take care of.

The REFEREE: Well, the long and short of that is, that the money which you put to his credit on these occasions whereby his overdraft was wiped out, the indebtedness for the money was put into the notes?

The WITNESS: The indebtedness represented in the deposits was put into the notes. I want to say further that there was deposits made by Donnell that took care of the overdrafts independent of any money loaned by the bank. If we placed to the credit of Mr. Donnell a note for $2,500 on October 1st, on an account which stood overdrawn $909.67, Donnell would receive credit for just what he received. The net credit would be the balance. He had overdrawn at that time only $268. The checks offered in evidence might have been paid after the $2,500 note went to his credit. I examined only some of the checks in evidence. Some I did not examine. It would be pretty hard, perhaps, for me to deny that the interest checks were signed by the bank. I never authorized the signing of any of them; I claim they were entirely unauthorized by me, and that is as far as I can go; I never authorized them to charge anything to anybody; never authorized anybody in the bank to draw such checks as that; had nothing to do with authorizing anybody to draw those debit checks; I never authorized the signing of any one of those checks.

As far as I know the credits given to Mr. Donnell, growing out of these transactions, are correct, so far as the debits—that is, his checks—are concerned. As to the lump sum, I could not say, but the balances appear to be just the balances we have on our books.

W. H. SEEGER, being called as a witness on the part of plaintiff, testified as follows:

Direct examination by Judge GIBSON:

The WITNESS: In 1892 I was president of the Citizens National Bank of Kansas City, Missouri. I had the transactions with Mr. Donnell in relation to the purchase of the $15,000 I. B. Mason note. Mr. Donnell had been a customer of the Citizens national bank, of which I was president, very nearly from its organization. He made a great many deposits and a good many checks, and, at various times, we loaned him money. A short time prior to October 29th, 1892, Mr. Donnell came to me and told me he had a $15,000 note that was due and past due in the hands of Mr. Dean for collection, that was executed by him in favor of one I. B. Mason; that Mr. Dean

threatened to foreclose him and sue him for damage, attach him and foreclose him; that he had gone so far as to borrow money to take up—that he had borrowed $8,000 from Forbis & Yeager, loaning agents, the proceeds of which he deposited or had on deposit with our bank at the time, October 29th, 1892. He told me that he had also tried to borrow money in other places, and had almost consummated it at one time, but it fell through, so he came to me and asked me if the bank would lend him enough more money besides what he had on hand then in the bank (which was about $8,000) to take up this indebtedness; I told Mr. Donnell he very well knew that he already owed us $7,000 in the shape of a note which was not due, and was not secured, and I doubted very much whether the bank
33 would loan him any more money without security. He then suggested that I present it to the bank that way; that he pay, with the money he had on deposit, the note owing us then but not yet due and we purchase and take up and hold for him temporarily the note of $15,000, payable to one I. B. Mason, with interest up to the date it was taken up. I presented the matter to the board, who considered the whole matter; that we had no security for the indebtedness we already had, and they finally decided, upon the urgent request of Mr. Donnell, that we purchase the note of Mr. Dean, if he would take up the note for $7,000 which we already had against him. We agreed and I took up from Mr. Dean the note and paid him therefor $15,801.69. Then Mr. Donnell came right in and gave a check for the interest in the two checks amounting to $801.69, and we then credited up the $7,000, paid and charged up the notes—the $15,000 note by Mr. Donnell and his wife, and I endorsed thereon: "Interest paid to October 29th, 1892," which we carried only a short time, until Mr. Donnell could find some person on the outside to take it up and carry it for him, as it was against our rule to purchase a note or loan money on a note secured by real estate. We were only permitted to take that kind of a note when there had been a previous indebtedness made that had not been secured.

The $8,000 that Donnell had in the bank took up the former indebtedness of Mr. Donnell to the bank. On the day that the bank bought the Mason note he paid the interest that the bank had paid Mr. Dean to get it, and then we started with a straight, flat-footed $15,000 indebtedness. The bank was to carry this Mason indebtedness only temporarily. He gave me his check for $175, which paid the interest from October 29th, 1892, to December 29th, 1892. We started out the first of the year with a $15,000 indebtedness straight, which he still promised to place, which we held only temporarily. Mr. Donnell paid the interest on that indebtedness. On June 29th, 1893, he gave his check for $525, which was interest for 6 months from December 29th, 1892, to June 29th, 1893. It run along, and from December 29th, 1892, when he paid me that interest, it run along then until the end of June of the following year, which was 1893, and I called on Mr. Donnell then, as he had not taken it up out of the bank (the indebtedness). I called on him then for the

six months' interest, as I told him it was our invariable rule that our interest must be paid every six months, so that we could so report to the Comptroller of the Currency, and furthermore, if the interest was not paid every six months, or we hold a note for over six months without the interest being paid, we have to report it to the comptroller as such and he calls it a bad debt and orders us to proceed either to get the money or proceed by law. There was no interest paid until he gave me the check on February 18th, 1895, for $525. The last interest had been paid to June 29th, 1893. At the end of December, when I called on Mr. Donnell for another six months' interest, not only for the six months' interest, but for the whole note, he could not pay any of it. Then I called on him for the six months' interest. He told me he had no money to pay at the time, but as he didn't have it, he would pay me interest on the interest that was due then. The note was still in the same shape. He hadn't found anybody to take it up. Hadn't had any money to pay interest with, and told me so—or promised to pay this indebtedness time and time and time again. He promised to pay the $2,000 and $20,000 notes of April 29th, 1896. Then, when the notes of June, 1894, came due, there was a year's indebtedness past due and unpaid and the records of the bank showed a note on hand on which there was a year's interest past due, and I would have had to report it as such to the Comptroller of the Currency, and to obviate showing that there was more than six months' interest past due on it, I made out a draft against Donnell, payable to the cashier of the bank, dated June 30th, 1894, put that into the cash and credited interest with that amount, and also made an entry on the note, "Interest paid to December 29th, 1893," and carried that as a cash item until February, 1895. That was for Donnell's benefit. That is the draft dated June 30th, 1894: "Pay to S. W. Campbell, cashier, five hundred and twenty-five dollars," marked "Exhibit 35."

The interest due December 20th, 1893, was not paid until February 18th, 1895. Omitting that payment the interest was due and unpaid from June 30th, 1893, until July 12th, 1895. The last interest that was paid was paid in February, 1895, at the end of June or the first of July there was another six months' interest falling due, and still unpaid on the $15,000 note. A suit had just been terminated, known as the Mackenzie suit, against the property which secured this $15,000 note of Mr. Donnell and I. B. Mason and we carried it in that shape for Mr. Donnell past due to accommodate him so that it would not prejudice his case in any way, but we were only compelled to carry it so as he promised from
34 time to time to find a party to take it up; but he didn't do it, so that after the Mackenzie suit was over I told Donnell, "Now, then, you can and must shape it in some way so that the Comptroller of the Currency won't haul us over the coals on this note all the time," and to do so we will loan you more money provided you will give us other security, as the security we had was decided by the suit only as a judgment for less than one-half the amount. Mr. Donnell agreed to do that, and brought me in a tax

list of his properties and told me to have the bank select such as they would choose as they would want to loan him $20,000—he wanted to borrow $20,000.

We looked over the list and selected two or three pieces. That was shortly prior to July 13th, 1895, before he made the $17,500.00 note. The bank decided on several pieces of property, and Mr. Donnell agreed to make mortgages on these properties. We investigated and selected two or three pieces of property and concluded that if he would give us a deed of trust—if he would make a separate deed of trust on each one of these properties, we would loan him $20,000.00. I told Mr. Donnell that I would loan him $17,500.00 and take this Mason note with a deed of trust as collateral security and give him the rest of the money when he gave us the deeds executed for the property selected. That was agreed to with Mr. Donnell. I wrote out the note and he signed it, and I wrote out the collateral clause stipulating this I. B. Mason note, and he signed it, and I figured the interest then right before Mr. Donnell on the Mason note up to that time; and in figuring the interest then he insisted that I compound the interest as he asked me to do when he could not pay it when it was due. That was compounded for a period antedating that time; then I computed up that note and made it $16,672.76. The correct figuration is $16,694.18; and the note was $15,000, which would have made the total due on the Mason note $16,694.17. I placed to his credit July 12th, 1895, $827.24. The amount that I computed it at amounted to $16,772.76, and the interest with the note made it $16,672.76, and I credited to this account $827.24; that made $17,500.00—the $17,500.00 does not include any overdraft or penalties; that was just $17,500.00 I loaned him to pay up his indebtedness with.

In the meantime, between July 12th, 1895, and October 1st, 1895, Mr. Donnell executed three notes, one for $12,000.00, one for $10,000 and one for $6,000.00 secured by deed of trust dated September 14th, 1895, payable in five years after date at 6 per cent. The execution of these three deeds of trust securing the $6,000.00, $10,000.00 and $12,000.00 notes was taken pursuant to the agreement that he had before that time entered into with the bank. He executed those deeds of trust and brought them into the bank, and thereupon, on October 1st, I loaned him from the bank $2,500.00, and took his note for $2,500 on October 1st, 1895, on demand, and wrote on the back the collateral clause citing these three notes as collateral. The notes were signed by him and the collateral clause was signed by him and I passed it to his credit on the books of the bank October 1st, 1895; after we had loaned him the $17,500.00 and taken his note, he went to work then to execute those papers, and they were not gotten up, they were not ready for me until he brought them in October 1st, 1895, although they were executed September 14th, they were not delivered until October 1st, 1895. No overdraft or penalty entered into the $2,500.00 note. I loaned him $2,500.00 and put the whole $2,500.00 to his credit to take up his indebtedness. To explain about the execution of the $2,000.00

and $20,000.00 notes, Mr. Fitzhugh at that time was connected with the bank and I was cashier, and he insisted that the interest be paid up, and he agreed to lend him $2,000 more, making $22,000.00. They had loaned him $22,000 on this same security and Mr. Fitzhugh asked me to take a note for $2,000 and $20,000, as by the laws governing national banks we are not allowed to loan any one man more than one-tenth of our capital stock, which was $20,000.00, so it was divided into two notes which were executed April 29th, 1896. No penalties or overdrafts entered into either of those notes. The $20,000 note went to take up his $17,500.00 note and the $2,500.00 note and interest to that date, which I figured at that time amounted to $1,077.68, and I placed $922.32 to his credit, making the total $22,000.00. I figured the interest on those two notes at 7 per cent. straight from that date until April 29th, 1896. The $2,000 note and the $20,000 note dated April 29th, 1896, are one and the same transaction. The correct figuration makes it, as I compounded interest on the $15,000.00 note once a year at 7 per cent. per annum. No compound interest entered into the $2,500.00 note, nor into the $2,000.00 or $20,000.00 notes.

The books of the bank were correctly kept, so far as I know, during the time of these transactions. I am a bookkeeper myself; I looked over the books every day. Transactions shown on those books were had at the time and dates purporting to be shown on the books, except that when Mr. Donnell came in late of an evening, for instance the notes I took on the evening of July 12th after the bank's close and they could not go on our books until the next morning, so that the entries will show on the books the next morning. That happened in several cases. I have examined the books to explain to the court this $525.00 transaction of February 18th, 1895.

Q. I will ask you whether or not in these matters you intended to violate the law, either Federal or State, in any of these calculations, or any of these charges.

Objected to by counsel for defendant as absolutely immaterial, having no bearing on the issues in the case.

Objection overruled; to which ruling and action of the referee the defendant at the time duly excepted and still excepts.

A. No, sir, I never had any intention of charging Mr. Donnell anything contrary to the contract to the laws or contrary to the contract with Mr. Donnell.

We took the $2,000.00 and $20,000 note because Mr. Donnell wanted more money and they were split up in that shape to comply with the law of the national banking act, namely, that a bank should not take a note or loan a man more than ten per cent. of its capital, which amounted to $20,000.00, therefore it was divided up.

The Mackenzie suit was a suit by the Mackenzie heirs to wrest the title from Mr. Donnell to part of the property on which the bank held security. There was a contest in the court on that question.

(At this point it was admitted that Donnell was chargeable with the $300.00 fee of Henry Wollman.)

Cross-examination by Mr. GARNETT:

The WITNESS: The memorandum marked "Exhibit 36" is in my handwriting. When it was made I had no idea of any suit between the bank and Mr. Donnell in reference to these matters when it was made I thought my mind was clear as to the matters stated in the memorandum and I thought they were correct. I was in good health and knew what I was doing. I knew from my own knowledge of the business of the bank that it had been charging these penalties or interest charges against Mr. Donnell. It was done by the authority of the bank. At the time I figured up the items that went into the $17,500 note I then thought it was right. Mr. Donnell insisted that as he did not pay the interest promptly when I demanded it every six months that I should compound those interest payments. When Mr. Donnell presented the draft in evidence I went back and looked it over thoroughly and found out then the error. This draft was carried in the cash drawer as a cash item. Mr. Donnell knew nothing about that draft until I gave it to him. It is not stamped paid and don't amount to anything. It was merely a memorandum of the bank. It is a memorandum that I made so that I could credit the interest up to December 29th, 1893, on that note and not to show at that time more than six months' interest due; on the back of this $525 draft I see some figuring scratched out. I have no recollection of the question coming up as to paying interest on that draft. I don't recollect that I figured interest on this for the time it had run amounting to $23.26, and Mr. Donnell saying, "Oh, no, Mr. Seeger, don't let that go," and my saying, "All right, just call it square." Those figures seem to be my figures in my handwriting. I can't tell who scratched them out. I testify that I have no recollection of any such talk.

There was no understanding about interest at all further than the instrument called for, because he was expecting to take it up the next day or two and it would never be in the bank there any length of time.

The object of taking the three mortgages was that our security had been impaired by the law suit over one-half and Donnell wanted more money and I told him we could not loan him any more without additional security, and we must have additional security as it was our security then on hand that was impaired. I told Mr. Donnell that I would personally try and sell these notes so that he could take up his indebtedness to the bank. They were made payable to me for the reason that we did not take real estate notes direct to the bank.

I don't know what the understanding at the time the Scruggs loan was made was about these three checks taking up the entire loan. This is a matter of Mr. Scruggs' business with Mr. Donnell; it has nothing to do with the bank whatever. There may have been something of that kind done by me as agent for Scruggs but
36 nothing to do with the bank's transactions.

I merely contemplated loaning him $1,750 of Mr. Scruggs'

money to do with just as he pleased; he may have asked me to write the checks, I don't know anything about it; the three checks are: One in favor of W. H. Scruggs, another for $525.00, and another for $544.80, payable to Annie B. Wagner, all written by me and signed by Mr. Donnell. He used the money that I loaned him to pay these checks; there was no understanding that this should be one and the same transaction; I just loaned him the money and took up his indebtedness as he chose; he could check on it any way he chose; I did finally receive those checks in money; it will come to me virtually.

I have re-figured the interest on the Mason note as shown by that statement; I figured it with Mr. Fitzhugh, and we both figured it the same thing, for we figured the interest on those notes from December 29th, 1893, to July 12th, 1895, and compounded the note every six months—that is a correct figuring. Beginning with December 29th, 1893, compounding the interest every six months, would bring out those figures without mistake; I had calculated in my calculation that interest that was due December 29th, I had carried a year and two months before I got the money; I figured it hurriedly and it came out that way, with what I could think of at that time; I thought that I had thought of all that was to be figured on, but I found on examination I was mistaken; I am speaking now of "Exhibit 36." No overdrafts of any sort were calculated into that statement or went into the $17,500 note. The memorandum on the back of this duplicate ticket came about in this way: Mr. Donnell didn't have his pass book with him so that I could enter this credit of $827.24; I therefore gave him the duplicate ticket for the amount so that he could bring it in and have it entered on his book. He never has had that entered and did not bring in the duplicate.

Now, then, to show how Donnell stood—how he came out after all transactions—after interest was calculated up and taken out, the note and interest amounted to $16,672.76; subtracting it from the amount of the note, gave him a credit of $827.24; after putting that to his credit and everything was taken out I made this up to show that he had then left $230.50 to the credit of his account to pay checks with. The $596.24 was composed of items that had been theretofore drawn out by Mr. Donnell—checks that we had paid that overdrew his account prior to that time. The checks were paid and everything that was charged to him up to that time made the overdraft $596.24; that overdraft consisted of checks that we paid and charged to his account, and every memorandum that was charged to his account was charged to his overdraft.

By the REFEREE: There is no doubt about that at all.

The WITNESS: When the bank purchased the Mason note there were no coupons attached because it was long past due; I can't recollect one coupon being attached. At the time we bought the Mason note there was no agreement about interest at all; there wasn't anything said about interest until I demanded it, as I stated. When December 29th came along, and the end of the year, I wanted

my interest paid to make my semi-annual charge, and I called on Mr. Donnell for $175.00, which was the interest for two months at 7 per cent. We did not have at any time any written agreement concerning the rate of interest on the Mason debt. When the first six months' interest came due I called for it and he paid it, and when the next six months' interest came due, which was December, 1893, I called for it and he couldn't pay it, and then he told me, as he could not pay it, his understanding was that he was to pay at least for six months, but he said he would pay me interest on interest at 7 per cent. per annum. The interest on the Mason note was not paid in full until February, 1895, when Donnell gave me his check for it. On July 12th, 1895, there was endorsed on the note "Paid" up to that time. When I made the draft of June 30th, 1894, I endorsed, "Interest paid to December 29th, 1893," so that the note itself would not appear more than six months past due. The credit of interest was endorsed on the note at that time for the draft. If the calculation on the Mason note was properly made, now, I would compound the interest once a year at 7 per cent. per annum.

Redirect examination by Judge GIBSON:

The WITNESS: The memorandum on the back of "Exhibit 36" is a mistake in the proper calculation of what I tried to collect but it is a proper calculation of an example of that kind. The only mistake I claim was in the data, the basis I started from. That memorandum on the back of "Exhibit 36" was not any statement from the bank at all, was not intended to be. That memo-
37 randum was merely as I stated. He did not have his book for me to enter it on, so I just made a memorandum showing what balance he would have to his credit after he got through with those transactions.

In taking those collateral notes, although payable to me, I acted for and on behalf of the bank. In regard to the Scruggs business, I loaned $1,750 to do with as he pleased. The $1,750 was simply taken as an ordinary deposit in the usual way by the bank.

We heard of this question of usury after suit was brought right in Carrollton in the early part of last July; that was the first time anybody connected with the bank ever heard of it. Mr. Donnell never did question anything with me or the bank about those settlements. Demand had been made time and again of Mr. Donnell for the payment of the $2,000 note and $20,000 note, and he promised to pay them time and again prior to the beginning of the suit.

(It was admitted that at the time plaintiff bought the Mason note there was one coupon attached and Mr. Donnell, in giving the two checks amounting to $801.69, took up that overdue coupon together with the overdue interest in addition to the coupon.)

WITNESS: It is not possible in any calculation to figure up this interest at more than 8 per cent. per annum on this indebtedness.

The most that it can be figured at on defendant's theory is about 7⅛ per cent. on the whole debt per annum, not compounded. What I have reference to is what we did collect would make more than 7⅛ per cent. of the entire indebtedness.

Thereupon plaintiff introduced in evidence the deed of trust securing the Mason note, the $20,000 note and the $2,000 note, dated April 29th, 1896, with their respective endorsements.

(The deed of trust is omitted from this abstract for the reason that it is unimportant to the consideration of the questions now presented.)

Said notes are in words and figures as follows:

The Note Sued On.

"$20,000. KANSAS CITY, MO., *April 29th*, 1806.

For value received, on demand after date, I promise to pay to the Citizens National Bank, Kansas City, Missouri, or order twenty thousand no-100 dollars, at its office, Kansas City, Missouri, with interest from date at the rate of 8 per cent. per annum until paid.

(Signed) M. S. C. DONNELL.

No. 32020.
Due: "D."

(Endorsements.)

Interest on this date amounting to $2792.04 is this day paid on within note. January 25th, 1898.

$2217.96 is this — paid on the principal of the within note, January 25th, 1898.

This note and any other indebtedness I now owe or may hereafter incur to the said bank is secured by the following collateral:

Note and mortgage dated July 29th, 1886, made by Catherine and M. S. C. Donnell, and note and mortgage $12,000, $6,000 and $10,000, dated September 14th, 1895, made by M. S. C. Donnell, with full authority to sell the same at public or private sale, without notice, on non-payment of this note or any other indebtedness to the bank.

(Signed) M. S. C. DONNELL."

Note for $2,000 in Action in Carroll County.

"$2,000. KANSAS CITY, MO., *April 29th*, 1896.

For value received, on demand after date, I promise to pay to the Citizens National Bank, Kansas City, Missouri, or order, two thousand no-100 dollars at its office in Kansas City, Missouri, with interest from date at 8 per cent. per annum until paid.

No. 32021. M. S. C. DONNELL.
Due: Demand.

(Endorsements.)

Interest to this date amounting to $278.20 is this day paid on within note. January 25th, 1898.

$221.80 is this day paid on the principal of the within note. January 25th, 1898.

This note and any other indebtedness I now owe or may
38 hereinafter incur to the said bank is secured upon the following collateral:

Note and mortgages, one note $15,000, dated July 20th, 1886, and the notes of $12,000, $3,000 and $10,000, respectively, dated September 14th, 1895, all made by M. S. C. Donnell *et al.*, with full authority to sell the same at public or private sale, without notice, on non-payment of this note or any other indebtedness to the bank.

M. S. C. DONNELL."

Thereupon plaintiff introduced in evidence the deposition of defendant, taken before a notary public.

(The deposition of defendant is omitted from this abstract for the reason that it is unimportant to the consideration of the questions now presented.)

And the deposition of Mr. William Ballinger was also offered in evidence by the plaintiff to identify certain testimony given by the defendant at Carrollton, Missouri, in the $2,000 case, but the same is omitted from this abstract for the reason that it is unimportant.

And thereupon the defendant, by way of sur-rebuttal, offered and introduced evidence as follows:

M. S. C. DONNELL, being recalled upon his own behalf, testified as follows:

Direct examination by Mr. GARNETT:

The WITNESS: My recollection is that when Mr. Seeger wrote those three checks, he presented the $525 draft, figured up this interest and found there was not enough money in the Scruggs loan to pay more than the three notes (checks), and he then scratched out and made it $525 so as to keep the three checks within the amount of the $1,750. I asked him there, instead of making it $1,750, to make them more so I could pay enough to pay my overdrafts in the bank, and he said that Scruggs did not have that much money, so he refused to give me money to pay the overdraft, or even enough to pay the interest. When he came to that conclusion he scratched it off and said, "Let it go." There was no agreement to pay interest on that overdraft. Nothing was said about it. Nothing was ever demanded about it other than I have testified.

Defendant thereupon offered in evidence a note dated February 18, 1895, for $1,750, payable one year after date to W. H. Seeger, at the Citizens national bank, with interest from date at 8 per cent.

per annum, signed by M. S. C. Donnell. (This note was originally dated February "15," but over the "5" of the "15" was written the figure "8." The "8" was written after the "5." (These facts were admitted by counsel to be true.)

And thereupon the plaintiff, by way of rejoinder, offered and introduced evidence as follows:

Mr. S. J. FITZHUGH, recalled as witness on behalf of plaintiff, testified further as follows:

Direct examination by Judge GIBSON:

The WITNESS: I was one of the parties who participated in the settlement of April 29th, 1896, between Mr. Donnell and the bank, when the $20,000 note in question and the $2,000 note were taken by plaintiff from defendant. These two notes were treated by plaintiff and defendant as a new transaction. The $17,500 note of July 12, 1895, and the $2,500 note of October 1st, 1895, were surrendered to him. I figured the interest on the $17,500 note, dated July 13th, 1895, up to April 29, 1896; that was a demand note, the time was 293 days, and the note drew 7 per cent. from date; interest should be $997. On the $2,500 note dated October 1st, 1895, that was figured up to April 29th, 1896, and the time was 212 days at 7 per cent. from date, the way the note read. It was a demand note also; it is $103.07. Both of these at straight interest, the interest amounted to $1,102 on both notes. The interest, as Mr. Seeger figured it—he made a mistake at the time, but not as to the rate. He made it $1,077.68, nearly $24 too little. I figured the interest on the overdraft at 6 per cent. straight, without compounding, after the giving of the $17,500 note at 6 per cent., and that amounted
39 to $30.92. That was straight interest. The penalties as to large overdrafts from February 18, 1895, and the date that they appear as to new overdrafts on our book, after the deposit of the $1,750, are $12.43. I also figured the interest on the Mason note, that is the $15,000, at 7 per cent. straight, without compounding. I figured that from June 29, 1893, the date of the last payment that was made on the note on account of interest, until February 18, 1895, and then I figured 6 per cent. interest on each semi-annual interest payment that he should have made—six months' interest that he had paid as far as he could, and could not pay any longer; I figured interest at 6 per cent. on the amounts he could not pay. There was no second compounding of interest; that made $17,941, instead of, as Mr. Seeger figured, $16,672.76. The total of all the interest figured by Mr. Seeger as the total amount of interest on the Mason note, on the $17,500 note and the $2,500 note together with the penalties on the overdrafts as they appear on the books, makes a total of $2,822.87; we are entitled to $2,840.35, but we did not receive within $17.48 of the amount we should have received in the making of these new notes.

That is the total transaction from the beginning, and I say that th $525 interest that was due of December 29th, 1893, was not pai until February 18th, 1895; I figured 6 per cent. interest on tha from December 29th, 1893, up to February 18, at the time it wa paid, straight. Then I figured 6 per cent. interest on the 6 month interest that should have been paid, from June 29th, 1894, up t July 12, 1895; then the interest that should have been paid on D cember 29th, 1894, I figured at 6 per cent. interest on that up t July 12th, at the time the settlement was made; then interest tha should have been paid on June 29th, 1895, I figured for 13 da up to July 12th, 1895, at the time the settlement was mad that leaves us short $17.48. The $17.48 should appear somewher in these transactions. There were two settlements with Donnel one on the 12th of July, in which interest on the Mason note ha been considered, and we did not get within $35 or $36 of what w were entitled to, and the next on the $17,500 note and the $2,50 note that we did not get within about $24 of what we were entitle to on April 24th, 1896; we ought to have had $24 and some cen more.

These notes for $22,000 ought to have been for $17.48 more, an that is figuring straight interest on the principal of the Mason in debtedness and straight interest at 6 per cent. on each installmen after June 29th, 1893, to the time they were paid, except on th $525, which was credited on the note as of December 29th, 189 That computation only includes 7 per cent. interest straight on th $17,500 note and the $2,500 notes from their dates respectively unti April 29th, 1896. Those were figured by the day because they we demand notes. We charge interest on demand notes by days unt it is paid; that is the custom among banks.

In my deposition and now I have stated that this $17,500 tran action was a new transaction, as shown by our books. The boo show a new loan—new note new numbering—$17,500 charged t bills receivable, "bills due," as we call them. It shows on the sam day a credit payment of $15,000, and also on interest credit pa ment of $1,672.76; also a credit to Mr. Donnell on his check or i dividual ledger account of $827.24; the total of those entries p together amount to $17,500.

W. H. SEEGER, recalled on the part of plaintiff, testified furth as follows:

Examined by Judge GIBSON:

The WITNESS: In my evidence the other day, I said that "A sho time prior to July 12th, 1895, Mr. Donnell came in and wanted t secure a loan," and we talked about it, and told him if he woul bring a list of his property so that the bank could be secured, tha it would loan him $20,000; and the note of $17,500 of July 12t 1895, was in pursuance of that agreement and was a new loan pu suant thereto, and the balance of the $20,000 that we had there

fore agreed to loan him was actually loaned him, as shown by the note of October 1st, 1895. It was a separate and distinct transaction from everything that preceded it, and was so taken and considered by both parties to the transaction. These amounts represented by these new notes passed to Mr. Donnell's credit on the books of the bank, and the new notes of April 29th, 1896, one for $20,000 and the other $2,000, were a new transaction and a new loan and so taken and considered and treated by both parties.

The $22,000 transaction was all one transaction and the one loan; it all comes under the same thing. It is called the same transaction, and if I stated that the $2,000 note of April 29, 1896, was a new loan simply to pay interest and overdrafts of Mr. Donnell at that time that was a mistake.

On April 29th, 1896, the $17,500 and $2,500 notes were taken up and treated and considered as paid by the $22,000 notes by both parties to the transaction. They were marked "paid" and delivered up.

Cross-examination by Mr. GARNETT:

The WITNESS: The Scruggs note, being "Exhibit 44," is, in my opinion, dated the "18th." It is in my handwriting. There was a "5" made before the "8." The Scruggs note, dated February 18th, 1895, is payable to W. H. Seeger; it was for Mr. Scruggs and not for the bank. I took most of those notes in my name.

And by agreement of parties a transcript of the general account of M. S. C. Donnell, as shown by the books of the plaintiff, from October 14th, 1892, to May 1st, 1896, was introduced in evidence, is attached to the report of the referee, and an abstract thereof is as follows:

(The dates shown below are dates on which transactions occurred and the balance changed. In the "debit" column are shown items charged to defendant (*i. e.*, moneys paid to him); in the "credit" column, items *credited* to defendant (*i. e.*, moneys paid or deposited by him); in the "balance" column are shown the balances either due from defendant to the bank or from the bank to defendant at the close of the respective days. The transcript shows those balances entered on the respective days following the transactions, but to condense the record we show the balance at the close of the respective days instead of the beginning. The figures are the same. Overdrafts are shown in the "balance" column "Dr., $——"). Usurious charges are shown in black faced type.

General Account.

Date.	Debit items.	Credit items.	Balance.
1892.			
Oct. 14			$76 82
" 15		$7 758 50	7 835 32
" 18	$71 87		7 763 45
" 19	42 40		7 721 05
" 27	46 67		7 674 38
" 28	8 010 00	500	164 38
" 29	7 901 69	8 000	262 69
" 31		100	362 69
Nov. 1	169 44		193 25
" 2	70 95		122 30
" 5	5 00		117 30
Dec. 19		80	197 30
" 31	175		22 30
1893.			
Jan. 6		50	72 30
" 9	1 091 89		Dr. 1 019 59
" 10	224 26		Dr. 1 243 85
" 11		1 300	56 15
" 25		50	106 15
Feb. 1		63 50	169 65
" 14		20	189 65
Mar. 8	175		14 65
" 10		50	64 65
" 27		50	114 65
" 28	14 00		100 65
Apr. 10	36	200	264 65
" 12		35	299 65
" 24	120 120		59 65
May 3		72 10	131 75
" 15		25 25	157 00
" 16	150		7 00
" 23		40	47
May 26		28	75
41 June 1	589 52		Dr. 514 52
" 13		41	Dr. 473 52
June 22	100 00 1 872 80	2 500	53 68
" 23	1 00		52 68
" 26		65	117 68
" 28	25		92 68
" 30	**3 14**		

General Account—Continued.

Date.	Debit items.	Credit items.	Balance.
.....	$525	.....	Dr. $435 46
July 31.....	4 49	.....	Dr. 439 95
Aug. 31.....	4 53	.....	Dr. 444 48
Sept. 30.....	4 44	.....	Dr. 448 92
Oct. 31.....	4 62	.....	Dr. 453 54
Nov. 29.....	4 53	.....	Dr. 458 07
Dec. 30.....	4 58	.....	Dr. 462 65
1894.			
Jan. 31.....	4 77	.....	Dr. 467 42
Feb. 28.....	4 35	.....	Dr. 471 77
Mar. 31.....	4 86	.....	Dr. 476 63
Apr. 30.....	4 76	.....	Dr. 481 39
May 31.....	4 97	.....	Dr. 486 36
June 30.....	4 86	.....	Dr. 491 22
July 31.....	5 07	.....	Dr. 496 29
Aug. 31.....	5 12	.....	Dr. 501 41
Sept. 29.....	5 01	.....	Dr. 506 42
Oct. 31.....	5 22	.....	Dr. 511 64
Nov. 30.....	5 11	.....	Dr. 516 75
Dec. 31.....	5 33	.....	Dr. 522 08
1895.			
Jan. 31.....	5 40	.....	Dr. 527 48
Feb. 18.....	525 672 12 544 80	$1 750	Dr. 519 40
Feb. 28.....	4 90	.....	Dr. 524 30
Mar. 30.....	5 24	.....	Dr. 529 54
Apr. 25.....	50	.....	Dr. 579 54
" 30.....	5 30	.....	Dr. 584 84
May 31.....	6 00	.....	Dr. 590 84
June 29.....	5 90	.....	Dr. 596 74
July 13.....	.....	827 24	230 50
" 15.....	.....	80	310 50
" 17.....	52 75	.....	257 75
" 24.....	105 92	.....	151 83
" 29.....	19 13	.....	132 70
Aug. 29.....	300	.....	Dr. 167 30
Sept. 4.....	.....	100	Dr. 67 30
Sept. 17.....	200	.....	Dr. 267 30
" 30.....	1 55	.....	Dr. 268 85
Oct. 1.....	1 667 19	35	.....
.....	641 02	2 500	Dr. 42 06

General Account—Continued.

Date.	Debit items.	Credit items.	Balance.
Oct. 23		$60	$17 94
" 28		45	62 94
" 29	$240	250	72 94
Nov. 2	175		Dr. 102 06
" 5	90 95	40	Dr. 153 01
" 27	425		Dr. 578 01
" 30	1 70		Dr. 579 71
Dec. 31	5 98		Dr. 585 69
1896.			
Jan. 3	298 35		Dr. 884 04
Jan. 31	8 83		Dr. 892 87
Feb. 29	8 62		Dr. 901 49
Mar. 31	9 31		Dr. 910 80
Apr. 30	9 10	922 32	2 42

This was all the evidence offered and introduced on the hearing of said cause.

And thereafter, to-wit, on May 14th, 1898, the same being one of the regular judicial days of the said court at its April term, in 1898, said R. E. Ball, referee, filed his report in the above entitled cause and the testimony taken by him, said report being in words and figures as follows:

Referee's Report.

Whereas, the court did, on the 13th day of January, A. D. 1898, and at the regular January term thereof, make the following order in the above entitled cause, to-wit: "Now on this day, in accordance with a stipulation filed by the parties hereto, the court refers this cause and all issues therein to R. E. Ball, Esq., one of the attorneys of this court, as referee, to hear and decide all the issues herein, and that said R. E. Ball is directed to proceed with diligence to hear and determine the matters and controversies herein, according to law, and to report his findings of fact and conclusions according to law, and to report his findings of fact and conclusions of law, together with the testimony taken herein, to this court with all convenient speed. Said R. E. Ball not being akin to any party not interested in the event of this action."

Now, therefore, I have the honor to report to the court as follows:

Pursuant to said order and by agreement of parties, I proceeded to take testimony in said cause, beginning on the 31st day of

January, 1898, and continuing by adjournment, from time to time, thereafter, as shown by the evidence taken, and herewith returned, and made a part of this report.

Before proceeding to hear any evidence in said cause, I took and subscribed the oath prescribed by law in such cases, and the same is herewith returned.

Findings.

This action is on a promissory note for twenty thousand dollars given by the defendant to the plaintiff, dated April 29th, 1896, payable on demand, and bearing interest at the rate of eight per cent. per annum from date until paid. At the same time, another note for the sum of two thousand dollars was given by the defendant to the plaintiff, payable on demand and bearing eight per cent. interest from date.

A suit on this second note of two thousand dollars is now pending in the circuit court of Carroll county, Missouri. The defense asserted in this suit is that of usury, the execution and delivery of the note being admitted,

As collateral security to the note here sued on, and to the two thousand dollar note mentioned, the defendant pledged with the plaintiff three other notes, secured by real estate, one for twelve thousand dollars, one for six thousand dollars, and one for ten thousand dollars. Nothing has been paid or realized on the securities on account of his indebtedness, except the sum of five thousand dollars, received by the plaintiff on January 26th, 1898, from the sale of certain collateral property.

The history of the indebtedness, for which the note in suit and the two thousand dollar note mentioned were given, is as follows:

On the 29th day of October, 1892, the plaintiff, at the request of the defendant, purchased a note made by the defendant and Catherine Donnell, spoken of in the testimony as the "Mason" note, paying therefor the face of the note and accrued interest up to that date, and the defendant paying to the plaintiff the amount of the interest then due, leaving the defendant indebted to the plaintiff on account of said note, at that date, in the sum of fifteen thousand dollars. This note was overdue, and had coupon interest notes attached to it covering the interest that accrued before maturity.

By its terms it bore seven per cent. from maturity. It was intended by the parties, at the time of its purchase, that the bank should only take and hold the note temporarily for the ac-
43 commodation of the defendant, but time went on and he was not able to pay the note.

In the meantime he carried a bank account with the plaintiff, and on July 12th, 1895, his bank account was and had, for some time prior thereto, been overdrawn several hundred dollars. At that time defendant, not being able to pay either his overdraft or the Mason note, and several payments of interest on the latter being in arrears, arranged with the plaintiff to give a new note, covering all

of this indebtedness and securing a small additional loan. On that date he executed and delivered to the plaintiff his note for $17,500, payable on demand, and bearing interest at the rate of seven per cent. per annum; the overdraft and all charges for interest on that and on the note being embodied in the new note.

On October 1st, 1895, he borrowed the sum of twenty-five hundred dollars from the plaintiff, for which he gave his note, payable on demand, and bearing seven per cent. interest from date until paid.

Nothing further was done between the parties until April 29th, 1896, when the defendant, being overdrawn at the bank and not having paid either of the notes mentioned, or any interest thereon, made a new arrangement with the officers of the plaintiff bank to give new notes covering the various debts then owing by him, as evidenced by the former notes and his overdrawn bank account.

According to the computation of these debts and the interest made at the time, the amount of the new notes given on April 29th, 1896, was as stated: One note for $20,000, being the one here sued on, and another for $2,000, being the note sued on in the action now pending in the circuit court of Carroll county. The reason for taking two separate notes was, that the amount of the defendant's indebtedness, as claimed by the plaintiff, exceeded the amount for which, under the national banking act, the plaintiff was permitted to become creditor to any one individual, and the desire was to dispose of the surplus two thousand dollars of claimed indebtedness separately. At the time of the making of these two notes, the defendant received credit on his individual account, which left a small balance over and above the amount of his overdraft.

At the time of the making of the $17,500 note, July 12th, 1895, there was included in this note the original Mason note of $15,000, three semi-annual interest charges of $525.00 each, and interest on the overdue interest, from the time it was due, to the date of the note, and also and overdraft charge of $596.74 and an additional advance credited to the defendant on his individual account at the bank of $230.50.

In making this computation it was agreed that the semi-annual interest due and unpaid on the Mason note should bear interest from the date it was due and it was so computed. This had been agreed to between the plaintiff and defendant at or about the time that the interest was due, and was agreed to by them at the time of making and signing of the $17,500 note. The overdraft included in this note of $596.74 contained charges on the actual amount overdrawn by the defendant of about one per cent. a month for the whole time of the continuance of the overdraft preceding the making of the note. These charges were evidenced by interest checks made out from time to time and charged to the defendant's account and returned to him on the balancing of his pass book, with other checks drawn by him.

At the time of the making of the note sued on and the $2,000 note mentioned, to-wit, April 29th, 1896, these amounts were arrived at

by computing the amount at that date of the $17,500 note of July 12th, 1895, and the $2,500 note of October 1st, 1895, and an overdraft of the defendant on April 29th, 1896, of $919.90, together with a balance credit on his pass book of $2.42, which made in all $22,000. The overdraft item in this computation contained charges for some months previous of about one per cent. a month on the actual amount overdrawn.

In both of those settlements of July 12th, 1895, and April 29th, 1896, the parties intended to and did merge into the notes, then made respectively, all of the indebtedness of the defendant to the plaintiff.

On July 12th, 1895, the item of overdraft as stated was $596.74. Of this amount $569.74 was the actual overdraft and the balance consisted of charges made monthly on account thereof.

On April 29th, 1896, the item of overdraft was $919.90; of this amount the actual overdraft was $876.36 and the balance consisted of the monthly charges. In each instance the whole amount of the note and the items of indebtedness which went into it, was figured between the plaintiff and the defendant and agreed to and 44 the notes accordingly executed

The defendant in each instance agreed to the interest charges and on overdue interest, and also knew of and agreed to the charges made on his overdrafts.

At the date of the two settlements made, on which the new notes were given, all the items of the then existing indebtedness of the defendant to the plaintiff were by agreement merged together. Taking them altogether and charging interest per annum, without compounding, the rate is less than eight per cent.

Conclusions of Law.

Although the evidence taken and returned is voluminous, there is really no dispute in regard to the essential facts of the case. The controversy all arises in regard to the inferences that ought to be drawn from the undisputed facts and the conclusions of law that must result therefrom. The Mason note only drew seven per cent. according to its face. The defendant and the plaintiff agreed when the semi-annual interest on that note was not paid that the overdue interest should bear interest, and this agreement was consummated by the giving of the subsequent $17,500 note. This was done, it should be remarked, in connection with the settlement of the overdraft of the defendant, then due.

I hold that it was competent for these parties to make and consummate that agreement without violation of the usury law so long as the amount of interest computed fell within the maximum legal limit of eight per cent. The same thing is true of the agreement made by the parties at the time of the execution of the note sued on in this case and of the $2,000 note on which suit is pending in another court.

Counsel for both parties have furnished me with able and exhaustive briefs and have argued the question arising with a great deal of ability and ingenuity. It is contended by plaintiff's counsel that both in the making of the $17,500 note and of the two notes bearing date of April 29th, 1896, the plaintiff made a new loan to the defendant and that those notes were not a renewal simply of the pre-existing indebtedness. I do not concur in this view. I do not doubt that the officers of the plaintiff attempted to put the transaction on that basis and did so in perfect good faith, but under the authorities I am satisfied that the notes in question were, as a matter of law, simply renewals on new terms then agreed upon between the parties of the pre-existing indebtedness.

Counsel for plaintiff also contend that the charges made on the overdrafts of about one per cent. a month were not interest charges, within the meaning of the usury law, but were penalties imposed on the customer of the bank for overdrawing his account.

I do not agree to this contention. I think that these charges were essentially interest charges, and if this action were solely for a debt evidenced by that overdraft I should have no doubt that the making of these charges would preclude the plaintiff from collecting anything but the actual original overdraft. But the defendant, at each of the times in question, was indebted to the plaintiff in several forms by different notes and by his bank account, and in my judgment the merging of these different debts into one, the agreement to the charges of interest made, one with reference to the other, all had the effect in law of mingling the debts and charges so that the real inquiry should properly be, whether on the whole indebtedness the defendant had agreed, by the note in suit, to pay a greater amount of interest than it was lawful for the plaintiff to charge. This he did not do.

The agreement of the defendant to pay interest on the overdue interest on the several notes made, preceding the making of the one in suit, was lawful, and when that was consummated by the signing of a new note it was a good consideration for the new indulgence thereby obtained. It seems to me that the only question in this case is the effect on the note in suit of the charge made by the plaintiff and agreed to by the defendant of a usurious rate of interest on the overdraft which formed an item of both the $17,500 note and of the computation of the debt for which this suit is brought. I think, beyond any doubt, that those charges taken in and of themselves were usurious, but the overdraft, in each instance, formed a very small part of the consideration of the note. The law of forfeiture, according to all of the authorities, should be strictly construed, and when these parties, by mutual agreement, merged all these debts into one, and when the total effect of that merger fails to show *in toto* an illegal agreement, under the usury act, my opinion is that the law has not been violated and that the grave result of imposing a penalty of forfeiting all interest on all the items that entered into that note should not be visited on the plaintiff.

45 It seems clear to, me, from all the authorities, by reason of the merger of these debts in the way stated, that there should be no forfeiture at all, but if any forfeiture should be had, it should only be of all interest charges on the overdrafts that entered into the note in suit.

The point is made that the defendant's answer does not adequately plead usury, in that it does — specifically aver the amount of usury charged and that entered into this specific note, and that the proof also fails to disclose definitely the amount alleged to be usurious.

I think there is a great deal of force in this objection, but I have preferred to base my conclusion on the broader grounds stated.

I find the issues in the case for the plaintiff, and recommend judgment on the note for $20,000.00, with eight per cent. interest from April 29th, 1896, to the date of the rendition of the judgment, after crediting the payment of $5,000 on January 25th, 1898.

Respectfully submitted,

R. E. BALL, *Referee.*

And thereafter, within four days from the time of the filing of said report and testimony, to-wit, on May 18th, 1898, the same being one of the judicial days of said court at its said April term, 1898, the defendant filed his motion to re-refer said cause to the referee, said motion being in word- and figures following, to-wit (caption omitted):

Motion by Defendant to Re-refer.

Now on this day comes defendant and shows to the court here that the report of the referee herein filed shows in substance that the transactions between plaintiff and defendant, in consequence of which the note in suit herein was made, grew out of the purchase by plaintiff of a certain note for $15,000, made by defendant and Catherine Donnell, payable to one Mason, and called, for convenience, the Mason note. That said note was so purchased by plaintiff on October 29, 1892; that at the date of making said note certain coupon interest notes had been thereto attached all of which said coupon interest notes were paid by defendant, and that none of said coupon notes have any connection with the matters involved in this cause. That the only amount claimed by plaintiff in respect of said Mason note was the face thereof, together with such interest herein as accrued after its maturity and after its purchase. That on July 12, 1893, defendant made to plaintiff his note for $17,500. That in this last named note was included, amongst other items of indebtedness claimed by plaintiff of defendant, the face amount of said Mason note, together with certain interest which plaintiff claimed had accrued on said Mason note since December 29, 1893, and long after the maturity of said Mason note, and long after said coupon interest notes thereto originally attached had been paid. That such interest on said Mason note so accruing after December 29, 1893, was by plaintiff charged as accruing and being demandable semi-annually,

and that interest was charged by plaintiff upon said semi-annual payments of interest so claimed by it, and that such charge of interest upon interest was computed upon said $17,500 note.

But defendant says that said report does not show the exact terms of said Mason note, does not set out a copy thereof, and does not find or state whether said note by its terms permitted or justified the charging of interest upon such interest as might accrue thereon after its maturity, and does not find nor state whether in point of fact defendant, at the time of or prior to the making of the said $17,500 note, agreed in writing that such interest as had accrued upon said Mason note after its maturity should or might be compounded.

Defendant further shows to the court that said Mason note did not and does not contain any provisions authorizing its holder to compound any interest which might accrue on said principal sum after its maturity. Nor did said principal note provide that any interest accruing after maturity should be demandable annually, semi-annually or at any named date or period, independently of a demand for the principal sum.

Defendant further shows to the court that he never made nor executed any instrument or agreement in writing whereby he agreed that plaintiff, or any holder of said note, might compound the interest which might accrue or had accrued upon said Mason note after its maturity, nor did he ever agree in writing that any
46 interest thereon so accrued after its maturity, or after plaintiff purchased the same, might be compounded or computed into said $17,500 note. He also further shows to the court that at the date of the said $17,500 note, the interest which had accrued at 7 per cent. per annum upon the principal of said Mason note, after its maturity, to-wit., from and after December 29, 1893, to the date of said $17,500 note, was compounded several times at six months rests, and that the face of said note, with such compound interest thereto added, was computed into said $17,500 note, said overcharge amounting to more than $150.

Defendant also further shows to the court that at the date of said $17,500 note he was indebted to plaintiff on overdrafts in the sum of $432.32. That no interest was in law chargeable by plaintiff upon any item of said overdrafts, but that plaintiff exacted of defendant interest thereon at the rate of more than 12 per cent. per annum, and the same, amounting to $164.42, was also computed into said $17,500 note. That he was likewise indebted to plaintiff upon overdrafts made between October 1st, 1895, and April 29, 1896; and that upon said overdrafts, plaintiff illegally charged and exacted of defendant interest at more than 12 per cent. per annum, and the said charge amounting to more than $96.10, was computed into said note made on that date.

Defendant says that unless the terms of said Mason note are set out in and made a part of the report of said referee the court cannot from said report be advised whether by its said terms plaintiff might legally compound the interest on said note which accrued after its

maturity; that unless said report states whether defendant made any written agreement that said interest might be so compounded, the court cannot therefrom determine whether plaintiff might legally compound said interest independent of the terms of said note; and that unless said referee makes and states an account showing the exact items which were computed into said $17,500.00, said $2,500.00, said $20,000.00 and said $2,000.00 notes, together with all credits, this court cannot from his report be advised as to what amount, if any, the plaintiff should recover herein.

Wherefore defendant moves the court to again refer this cause and to order and require the referee in addition to the report made by him:

1. To set out the exact terms of said Mason note by a literal copy of the same, together with all endorsements thereon.

2. To report whether, in point of fact, the defendant at or prior to the date of the said $17,500.00 note, to-wit., July 12, 1895, made or executed any agreement in writing whereby he agreed that the interest which might accrue or had accrued on the principal sum of said Mason note after its maturity, might or should be compounded, and if such writing was made, to set out a literal copy thereof.

3. To report whether, in point of fact, defendant at any time agreed in writing that any interest charged upon overdrafts, or any interest charged upon any interest, whether arising out of said Mason note or otherwise, might or should be included or computed into any note made by him to plaintiff since October 29, 1892. And if such writing was made by defendant to set out a literal copy thereof, and to state what, if any, the evidence shows was the consideration for such writing.

4. To make and state an account between plaintiff and defendant, beginning with the date of the purchase of said Mason note by plaintiff, down to and including the making of the notes of April 29, 1896, showing the several items which were computed into the notes for $17,500.00, $2,500.00, $20,000.00 and $2,000.00, including in said account defendant's personal bank account with plaintiff, showing the several items of overdraft, deposits, checks, interest charges and all items of debt and credit, together with all vouchers.

R. B. GARNETT,
WM. C. FORSEE,
Attorneys for Defendant.

Said motion was verified by affidavit of defendant.

And on the same day, to-wit., May 18th, 1898, the same being one of the judicial days of said court at its April term, 1898, and within four days of and from the filing of the referee's report as aforesaid, the defendant filed his exceptions to the report of the referee which are in words and figures as follows, to-wit (omitting caption):

47 *Defendant's Exceptions to Report of Referee.*

Now on this day comes defendant in the above entitled cause and objects and excepts to the report of the referee herein and to any confirmation thereof by this court, and assigns the following grounds of exceptions thereto, to-wit:

1. Said referee finds that "as collateral security to the note here sued on and to the $3,000 note mentioned, the defendant pledged with the plaintiff three other notes, secured by real estate, one for $12,000, one for $6,000 and one for $10,000." Defendant excepts and objects to this finding of fact as being outside of any issue in the cause, uncalled for by the pleadings and unsupported by any evidence in the cause.

2. Said referee fails to find and report to the court what were the exact terms of said Mason note; whether by its terms the interest thereon after maturity was to become due or demandable semi-annually or annually, or whether demandable at any time independently of and apart from the principal of said note or whether by its terms is permitted the charging, exacting or demanding of interest upon the interest which might accrue thereon after its maturity. Unless by the terms of said note the interest which might accrue thereon after maturity was demandable independently of the principal of said note, no interest could be demanded thereon by its holder independently of a demand for the principal of said note, and —such event no interest could accrue upon such interest. And in no event could plaintiff exact or demand any interest upon such interest or compound the interest there unless the terms of said note expressly authorized or permitted the same to be done and not then oftener than once annually. The referee should have set out in his finding of facts a literal copy of said note.

3. The finding of the referee is against the undisputed evidence in the case in this: It was admitted by plaintiff upon the hearing that plaintiff compounded interest of said Mason note which accrued after its maturity at 7 per cent. per annum at least once annually, and that the amount of the principal and interest thereon so compounded was computed into the $17,500 note made on July 12, 1895.

4. The referee fails to find what was the face amount of said Mason note or when the same matured, or whether by the terms of said note the interest to accrue thereon after maturity was demandable by the owner or holder semi-annually or annually, or at any time or period independently of a demand for the principal of said note, or whether by its terms it permitted the charging of interest upon such interest as might accrue thereon after maturity, and if so, at what period or rests such compounding could be made. The undisputed evidence in the case shows that no interest which might accrue on said note after maturity was demandable semi-annually or at any other time independently of a demand for the principal sum, and that no permission was given in or by said note to compound any interest which might accrue thereon after maturity.

5. The assumption made by said referee in his findings of fact to the effect that there were "several payments of interest" on said Mason note, which accrued thereon after maturity, is unsupported by any evidence in the case, and is against the undisputed evidence in the case, which showed that said Mason note by its terms provided that it should bear 7 per cent. interest after maturity, and that said note contained no provision or stipulation that said interest so accruing after maturity should be demandable at any named date or period, nor any provision or stipulation that any interest should be charged upon such interest as might accrue on said note after its maturity. And the undisputed evidence in the case was that defendant had never made or executed any writing in any way varying the terms of said note.

6. The referee fails to find whether, in point of fact, defendant agreed in writing that the interest which accrued upon the Mason note after its maturity should be demandable semi-annually, or at any other time or period independently of a demand for the principal sum of the said note, or that interest upon such interest should be demandable, or should be paid, or that any interest upon interest computed upon said note should be figured into the $17,500 note dated July 12th, 1895. The referee fails to find whether, in point of fact, defendant ever made any written agreement of any sort concerning the interest which might accrue or had accrued upon said Mason note after its maturity, other than that made in and by the terms of the note itself.

7. The assumption and finding by the referee that defendant's note to plaintiff for $17,500, dated April 12, 1895, contained
48 in respect of the item of the Mason note, only its face amount and interest thereon after maturity at 7 per cent. per annum from December 29, 1893, to April 12, 1895, is unsupported by any evidence and is against all the evidence in the case. It was admitted upon the hearing by plaintiff that so much of said $17,500 note as grew out of and was connected with the item of the Mason note, was the face of said note, plus interest thereon accruing after maturity, computed from December 29, 1893, at 7 per cent. per annum, compounded at least once annually. Outside of said admission, the undisputed evidence in the case showed that the face of said Mason note, together with interest thereon at 7 per cent. per annum, compounded three times at six month rests, and the whole again compounded for a period of 12 days, was computed into said $17,500 note, so that said note contained the face amount of said Mason note, together with interest thereon, compounded four times in less than nineteen months.

8. The finding of the referee that on October 1, 1895, defendant borrowed of plaintiff $2,500, is unsupported by any evidence and is against all the evidence in the case. The undisputed evidence in the case showed that said note was composed in part of an overdraft figured therein as being $909.87, whereas the true overdraft was $856.07, upon which was charged interest amounting to at least $50.14, and at a rate exceeding 12 per cent. per annum.

9. The finding of the referee that at the date of making the note sued on, "defendant received credit on his individual account, which left a small balance over and above the amount of his overdraft," is indefinite and uncertain, because the referee does not find or report the amount of defendant's alleged individual account with plaintiff, nor to what extent, nor for what purpose he received credit. The referee should have found and reported in detail as one of the material facts in the case, the exact state of defendant's account with plaintiff at the date mentioned, and should have found and reported the various items which entered into the note sued on.

10. Said referee reports that, "at the time of the making of the $17,500 note on July 12, 1895, there was included in this note the original Mason note of $15,000, three semi-annual interest charges of $525 each, and interest on the overdue interest from the time it was due to the date of the note." But said referee fails to find that, in point of fact, by the terms of said Mason note, any interest thereon after maturity was demanded semi-annually, or at any fixed date or period, or that by its terms interest upon the interest accruing thereon after maturity might be charged, or that defendant agreed in writing that any interest might be charged upon the interest of said note which accrued after its maturity, nor does said referee find that in point of fact the interest on said Mason note after maturity was demandable semi-annually.

11. The finding of the referee that the actual amount of defendant's overdraft on July 12, 1895, was $569.74, and that on April 29, 1896, it was $836.36, is unsupported by the evidence and is against the evidence in the case. The undisputed evidence in the case shows that at said respective dates the actual overdrafts were $432.32 and $823.80, respectively, and that there was added into the $17,500 note, $164.42 of interest, and into said notes of April 29, 1896, more than $96.10 of interest, calculated at the rate of more than 12 per cent. per annum in each instance.

12. The referee finds that on each of the dates last aforesaid the whole amount of the respective notes made by defendant, and the items of indebtedness which went into them, was figured between the plaintiff and defendant and agreed to, and the note accordingly executed. But the referee wholly fails to find or to report whether the agreement referred to was oral or in writing, and such finding is accordingly indefinite, uncertain and valueless upon that point. The undisputed evidence in the case shows that there was no written agreement, and the weight of the evidence is that there was no agreement of any sort.

13. The referee finds that "defendant, in each instance, agreed to the interest charges on overdue interest," but fails to find whether in point of fact this agreement was oral or written, or if written, to state the date and terms of such written agreement. The undisputed evidence in the case is that there was no such written agreement. It was admitted by plaintiff that there was none. The weight of the evidence was that there was no such oral agreement.

14. The referee finds that "at the date of the two settlements

made on which the new notes were given, all the items of the then existing indebtedness of the defendant to the plaintiff were, by agreement, merged together." And that "taking them alto-
49 gether, and charging interest per annum, without compounding, the rate is less than 8 per cent." This finding is indefinite and uncertain, because the referee does not say from what date he begins his computation whereby he finds that the rate is less than 8 per cent., nor to what date his computation extends, nor upon what items such computation is based. The undisputed evidence in the case shows that more than 12 per cent. per annum interest was charged upon large overdrafts from the beginning of such overdrafts, covering a period of many months, and down to the date when said $17,500 note was made, and that the actual amount of said overdraft, together with the 12 per cent. per annum interest charged thereon, was computed into said note as part thereof; that upon the making of said $17,000 note, the interest which had accrued on the Mason note from December 29th, 1893, and which remained unpaid, was compounded four times within nineteen months at 7 per cent. per annum, and that the face amount of said Mason note, together with such compound interest added thereto, was also computed into said $17,500 note; that a large overdraft, together with 12 per cent. per annum interest thereon, was computed into said $25,000 note of October 1st, 1895; that the two-thirds last named, each containing such usurious items, were computed into the said notes made April 29, 1896, and that a large overdraft of $823.80, together with more than $96.10 of interest charged thereon at the rate of 12 per cent. per annum for many months, was also computed into said notes of April 29, 1896.

15. Said referee does not state or report an account showing the exact dealings and transactions between plaintiff and defendant, with the several items, computations and calculations entering into the same, wherefrom the court might ascertain the various items which entered into said notes, and upon what basis the same were thereinto computed. The report of the referee does not with certainty nor distinctness state what was the condition of the account between plaintiff and defendant at the times of the making of said several notes, so that the items which entered into said alleged settlements or notes can be ascertained and examined.

16. The report of the referee wholly fails to show any finding of fact as to the exact state of the accounts between plaintiff and defendant at the times of making the $17,500, the $2,500, the $20,000 and the $2,000 notes therein mentioned, nor what items entered into said notes, nor any finding as to the full and exact terms of said Mason note out of which all of said transactions grew, nor whether there was at any time any written agreement between plaintiff and defendant whereby defendant agreed that the interest which accrued on said Mason note after its maturity should or might be compounded. Without a finding of facts upon these points, the court cannot understand said transaction and cannot intelligently determine the matters in issue in this cause.

17. Upon such of the facts in issue as are found by the referee, his conclusions of law are erroneous. Upon such facts so found, judgment ought to be rendered for plaintiff, if at all, for the amount of the principal sums which were computed into the no es sued on, after crediting thereon $5,000 received by plaintiff since filing this suit, and for nothing more. The conclusions of law reported by the referee are against the law and the evidence. Upon the law and the evidence the finding and judgment should be for defendant as to every item which entered into the note sued on, except the principal sums which entered thereinto, all interests being stricken out.

18. The referee erred in admitting incompetent, immaterial and irrelevant evidence offered by plaintiff, and especially admitting the record of the suit and parts thereof pending in Carroll county on the $2,000 note; also the depositions of William Ballinger and of defendant. Said illegal evidence so referred to threw no light upon any issue in this case, incumbered the record and increased the costs in this case, and could have been intended for no other purpose other than to prejudice the cause of defendant.

19. The referee takes no notice of and makes no report upon any defense interposed by defendant in this case other than that of usury, whereas defendant interposed a plea to the jurisdiction of the court, upon which said referee was required to report as upon issues therein made.

Wherefore, defendant says that said report ought not to be confirmed, but should be set aside and for naught held.

R. B. GARNETT,
WM. C. FORSEE,
Attorneys for Defendant.

And thereafter, to wit., on July 2nd, 1898, the same being during the April term of said court, A. D. 1898, the court over-
50 ruled the motion of defendant to re-refer said cause and also overruled defendant's exceptions to the report of the referee and entered judgment in favor of plaintiff; to which action, orders and rulings of the court the defendant at the time excepted and still excepts.

And thereupon a judgment was given and entered herein, as follows, to-wit:

Judgment.

Now on this day comes plaintiff herein, The Citizens National Bank of Kansas City, Missouri, by its attorneys, Warner, Dean, Gibson & McLeod, and comes also defendant, M. S. C. Donnell, by his attorneys, R. B. Garnett and W. C. Forsee, and the motion of said defendant to re-refer this case, heretotore filed herein, coming on for hearing, the same is by the court taken up, heard and duly considered; and after argument of counsel, and due deliberation, the court overrules said motion to re-refer this cause.

And the exceptions heretofore filed herein by said defendant to the report of the referee, Hon. R. E. Ball, coming on regularly for hearing, said exceptions are by the court taken up, heard and duly considered, and after argument of counsel thereon, and after due deliberation the court overrules said exceptions to the report of the referee and each and every one thereof, and the report of said referee heretofore filed herein is by the court taken up, heard and duly considered and said report of the referee in this cause is by the court duly and regularly confirmed in all respects, and the court, upon said report of said referee, doth find all the issues herein for plaintiff and against defendant, and doth further find that on April 29th, 1896, said defendant, M. S. C. Donnell, for value received, made, executed and delivered his negotiable promissory note of that date to plaintiff herein for the sum of twenty thousand dollars ($20,000), with interest thereon from said last named date until paid at the rate of eight (8) per cent. per annum; and the court doth further find that on January 25th, 1898, after the commencement of this suit, said defendant paid the plaintiff the sum of five thousand dollars ($5,000) on said note, leaving on said last named date a balance due on said note from defendant to plaintiff the sum of seventeen thousand, seven hundred and eighty-two 4-100 dollars ($17,782.04), which last named sum, with interest thereon at the rate of eight (8) per cent. per annum from January 25th, 1898, is due and owing from said defendant to said plaintiff, together with its costs herein expended and incurred; and the court doth further find that said referee, Hon. R. E. Ball, was engaged for the period of ten days in the trial and consideration of this cause, and that he incurred an expense of seventy-four dollars and twenty-five cents ($74.25) for his stenographer to take the testimony before him as such referee.

Wherefore it is ordered, adjudged and decreed by the court that plaintiff herein, The Citizens National Bank of Kansas City, Missouri, have and recover of and from defendant herein, M. S. C. Donnell, the sum of eighteen thousand, four hundred and six 79-100 dollars ($18,406.79), together with interest thereon from this date at the rate of eight (8) per cent. per annum until paid, together with its costs herein incurred and expended; and the court doth further order, adjudge and decree that said R. E. Ball, as referee herein, be and is hereby allowed the sum of one hundred dollars ($100.00) as compensation for his services herein, and that A. P. Barnett, the stenographer who took the testimony in the cause before said referee, be and is hereby allowed for his services as stenographer the sum of $74.25; and the clerk of this court be and is hereby ordered and directed to enter up and charge as costs in this cause the allowances herein made to said referee and stenographer, for all which execution shall issue herein.

And during the same term, and within four days from the entry of judgment as aforesaid, to-wit, on July 5th, 1898, defendant filed his motion for a new trial, which motion, omitting caption, was in words and figures as follows, to-wit:

Motion by Defendant for New Trial.

Comes defendant and moves the court to set aside its judgment overruling defendant's motion to re-refer the above entitled cause, and its judgment overruling defendant's exceptions to the report of the referee therein, and to grant defendant a new trial of said cause, and assigns the following grounds therefor, to-wit:

1. Because the action and judgment of the court upon each
51 of said motions and exceptions, and in rendering judgment against defendant, is against the law and the evidence in the case.

2. Because said action and judgment is against the weight of the evidence in the case.

3. Because upon the law and the evidence in the case said motion and said exceptions to said report should have been sustained.

4. Because upon the law and the evidence in the case plaintiff was entitled to judgment for no more than the principal sums contained and embodied in the note sued on, and was and is entitled to recover no interest on any of said items of principal in said note contained.

5. Because the judgment rendered by the court is excessive, and calls for more than plaintiff was entitled to recover under the law and the evidence in the case.

6. Because the judgment is unsupported by the law and the evidence and is against the weight of the evidence.

7. Because upon such of the facts in issue as were by the referee found and stated in his report, his conclusions of law, now sustained by the court, were erroneous. Upon such facts so found judgment can not be lawfully rendered for more than the amount of the principal sums which were computed into the note sued on, after crediting thereon $5,000 received by plaintiff since this suit was filed. The court erred in rendering judgment for a larger amount.

8. Because the court erred in refusing to require the referee to find and report upon all the facts in issue in the case and to state and report an account between plaintiff and defendant, showing so much of their mutual dealings and transactions as were carried into the note sued on.

9. Because the referee erred in admitting incompetent, immaterial and irrelevant evidence offered by plaintiff, and especially in admitting the record of the suit and parts thereof pending in Carroll county, and the deposition of William Ballinger and the exhibits thereto annexed.

10. Because the court erred in overruling defendant's motion to strike out so much of plaintiff's amended reply as set up the two year statute of limitation to defendant's defense.

R. B. GARNETT,
WM. C. FORSEE,
Attorneys for Defendant.

And at the same term, to wit., on July 16th, 1898, said motion for a new trial coming on to be heard by the court, the same was overruled; to which action, order and ruling of the court in so overruling said motion for a new trial, the defendant excepted and still excepts. And defendant was given until the 3rd day of the October term, A. D. 1898, of said court in which to prepare, have signed and filed his bill of exceptions herein.

And afterwards, to wit., on the 8th day of October, 1898, the same being one of the days of said court at the April term, 1898, an appeal was allowed herein to the supreme court of the State of Missouri, and the time given defendant to file his bill of exceptions was extended until on or before January 1st, 1899.

And on, to wit., the 28th day of November, 1898, the same being one of the days of said court at its October term, 1898, defendant filed his motion to stay execution and to quash a levy theretofore made by the sheriff.

And on, to wit., the 23rd day of December, 1898, the same being one of the judicial days of said court at its October term, 1898, the court for good cause shown, by order of record, extended the time within which defendant might file his bill of exceptions until on or before January 11th, 1899.

And thereafter, to wit., on January 7th, 1899, the court, for good cause shown, by order entered of record, extended the time in which defendant might file his said bill of exceptions until on or before sixty (60) days from and after said January 11th, 1899.

And thereafter, to wit., on March 4th, 1899, and within the time theretofore granted, the court, for good cause shown, by order entered of record, extended the time in which defendant might file his said bill of exceptions until on or before the 3rd day of the April term, 1899, the same being April 12th, 1899.

And thereafter, and on, to wit., April 8th, 1899, and within the time theretofore given, the court, for good cause shown, by order entered of record, extended the time within which defendant might file his said bill of exceptions until on or before May 1st, 1899.

52 And the said defendant did present to the court his said bill of exceptions and prayed the court to settle, allow and sign the same, and that it be made a part of the record in said cause and filed which was accordingly done April 22nd, 1899.

(Signed) EDWARD P. GATES, [SEAL.]
Judge of Division Number 3, *Circuit Court of Jackson County, Missouri.*

JOHN G. PARK,
Attorney for Appellant.

And afterwards, to-wit, on the 8th day of October, 1901, the further following proceedings were had in said cause, viz:

CITIZENS NAT. BK., Resp.,
v.
M. S. C. DONNELL, App.

Come now the said parties by attorneys, and upon their stipulation, it is ordered by the court that this cause be continued to the January call, 1902.

Which said stipulation is in words and figures as follows, to-wit:

In the Supreme Court of the State of Missouri, Division No. 2, October Term, 1901.

THE CITIZENS NATIONAL BANK OF KANSAS CITY, Missouri, Plaintiff and Respondent,
vs.
M. S. C. DONNELL, Defendant and Appellant.
No. 9685.

Stipulation.

It is hereby stipulated and agreed, by and between the appellant and respondent in the above entitled cause, that said cause which is now set for hearing in this court for the 11th day of October, 1901, may be set down for hearing at the January, 1902, call of the
53 docket of the October term, 1901, and that respondent may file and serve its brief at any time before the first day of November, 1901.

ROZZELLE & WALSH, *Attorneys for Appellant.*
WARNER, DEAN, McLEOD & HOLDEN,
Attorneys for Respondent.

And afterwards, to-wit, on the 15th day of January, 1902, the further following proceedings were had in said cause, viz:

CITIZENS NAT. BK., K. C., Resp.,
v.
M. S. C. DONNELL, App.

Now at this day, it is ordered by the court that this cause be continued to the April term, 1902.

And afterwards to-wit, on the 10th day of April, 1902, the further following proceedings were had in said cause, viz:

CITIZENS NAT. BK., K. C., Resp.,
v.
M. S. C. DONNELL, App.

Come now the said parties by attorneys, and after argument herein, submit this cause to the court.

And afterwards, to-wit, on the 27th day of October, 1902, the further following proceedings were had in said cause, viz:

THE CITIZENS NATIONAL BANK OF Kansas City, Missouri, Respondent, *vs.* M. S. C. DONNELL, Appellant. } Appeal from Jackson County Circuit Court.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Jackson
54 county circuit court rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Jackson county circuit court for further proceedings to be had therein, in conformity with the opinion of the court herein delivered, and that the said appellant recover against the said respondent its costs and charges herein expended and have therefor execution. (Opinion filed.)

And afterwards to-wit, on the 7th day of November, 1902, the further following proceedings were had in said cause, viz:

CITIZENS NAT. BK., Resp., *v.* M. S. C. DONNELL, App.

Comes now the said respondent by attorney and files its motions for a rehearing herein, and to transfer this cause to court in banc.

Which said motion for rehearing is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, Division No. 2.

THE CITIZENS NATIONAL BANK OF KANSAS CITY, Missouri, Respondent, *vs.* M. S. C. DONNELL, Appellant. } No. 9635.

Motion for Rehearing.

55 Now comes The Citizens' National Bank of Kansas City, Missouri, respondent in the above entitled cause, and respectfully moves the court to grant a re-hearing in said cause for the following reasons:

1. Because the decision is in conflict with sections 5197 and 5198 of the national banking act and deprives the respondent of the right

of charging interest in the transaction of its business as conferred upon it by said act.

2. Because the decision is in conflict with said sections of the national banking act, in that it inflicts penalties upon respondent for usury beyond those specified in said act and in conflict with the provisions of said act.

3. Because the decision is in conflict with the said sections of the national banking act in that it applies to respondent the provisions of the State law relating to interest and usury instead of the national law, and deprives respondent of the right to have its transactions measured solely by the national banking act.

4. Because by said judgment, the respondent is deprived of the interest upon the Mason note for $15,000, from December 29th, 1893, to July 12th, 1895, in violation of its right under the national banking law to said interest.

5. Because by said judgment the respondent is deprived of the interest upon the note for $2,500, from its date, *i. e.*, October 1st, 1895, to April 29th, 1896, in spite of the finding of the referee and the admission of appellant that there was no usury in said note prior to April 29th, 1896, the date it was cancelled.

6. Because by reversing this case with peremptory directions to the lower court to enter judgment instead of reversing the case and remanding it for a new trial, in accordance with the opinion, the court has deprived respondent of a right given it by law, *i. e.*, the *locus penitentiæ*, at which before actual payment or final judgment in a cause, the creditor may remit the excessive interest without penalty and recover its debt and legal interest.

I.

In compelling a forfeiture of all of the interest involved in these different and distinct debts, we submit that the court entirely overlooked the true reason of the provision of the national banking act in question, and has extended the penalty provided far beyond the intention of the act.

Briefly the facts are these:

On July 12th, 1895, Donnell owed the bank—

Principal on Mason note	$15,000
Three semi-annual interest payments on Mason note, $525 each, making total	1,575
Overdraft	596.74

56 Upon this date, July 12th, 1895, for the first time the Mason indebtedness and the overdraft indebtedness were brought together. Prior to this date these debts were each separate and distinct from the other. The Mason note contained no usury. The overdraft, it may be conceded, did contain usury.

Now at this point, we urge that the court has extended the penalty of the national banking act too far. The Mason indebtedness

might as well, on July 12th, 1895, have been maintained as a separate indebtedness and merged into a new note by itself. There would then have been no defense of usury to that indebtedness. So, also the overdraft indebtedness might have been placed in a note by itself, and under the opinion of the court, it would have been subject to defense so far as the interest on the principal sums in the overdraft is concerned. In other words, if this plan had been followed and the bank had brought two suits, or one suit in two counts, one upon the Mason note or its renewal and the second upon the overdraft note, or its renewal, Donnell could not have defended or avoided payment of interest on the Mason note on account of any usury, for there was none in it, but he could have pleaded that defense to the second count, because of usury contained in the overdraft items and the note taken to represent that particular debt. The judgment of the court therefore would have been in favor of the plaintiff bank for the Mason note, or its renewal, with interest to date at seven per cent., or such other per cent. as in its subsequent renewals the parties might have agreed upon, not exceeding eight per cent. The further judgment would have been upon the second count, only for the principal of the overdraft, without any interest, either legal or usurious.

But to suit the convenience of the parties, instead of keeping these debts separate, they were placed together in one note. The substance and actual facts concerning the debts remain the same, but merely in the manner of form is there difference. The $17,500 note therefore is made up almost wholly of the old Mason note, and the lawful interest unpaid upon it. A small fraction of it, representing the overdraft, is vicious, and because of the vice contained in the overdraft, the court not only says to the plaintiff bank, 'You shall not recover your usurious interest upon the overdraft, you shall not only forfeit the legal interest upon the overdraft, but by our judgment, we shall reach over to this heretofore unobjectionable debt, known as the Mason debt, and force you to forfeit all interest upon that,' losing sight, as we maintain, of the true principle contained in this act. That principle, we submit, is this—that the purpose of the act is to forfeit not only the excessive interest charged upon the *debt*, complained of for usury, but also even the legal interest upon that debt. The penalty therefore is that if the bank charges excessive interest upon such a debt it shall not receive an
57 interest *upon that debt*, that is to say in this case, upon the overdraft debts.

The very foundation of the right asserted by the courts to hear the plea of usury is that it will not be blinded or put aside by mere matters of form, as, for instance, the renewal of a usurious debt will not prevent the court from ascertaining the origin of this indebtedness, however far back it may run, nor from going back to its origin to cut out each and every item of usury contained in the entire history of the transaction. Were it not so, the courts would be precluded from going back of the last renewal or back of the note actually in suit, and in this case the court will be compelled to stop

at April 29th, 1896, the date of the note sued on for $20,000. But the court says, it will not stop at that point, but has a right to go into the very facts in the entire transaction between the parties however far back it may run, and see what the actual facts are, and wherever usury exists, locate it and strike it out. The usurious renewals, it is held, are void and without consideration. To this rule of law, we can make no exception at this time, but we say that it is as broad as it is long, and when the court has laid bare to its gaze all of the transactions between these parties, it will maintain the principle throughout which it asserts, that is, that it will not be governed by mere matters of form, but will seek only the actual substance.

Now the banking act says, it is true, that any association may charge upon any note or other evidence of debt, interest at the rate allowed by the laws of the State where the bank is located. That is to say, in the proper interpretation of this section, that for these overdrafts permitted to Donnell, this bank could charge him not exceeding eight per cent. per annum.

The next section of the act says that as a penalty for charging more than eight per cent. upon these debts, when knowingly done, the bank shall forfeit the entire interest which the debt carries with it. That is to say, shall forfeit the entire interest upon the debt which has had an usurious origin. The true construction therefore is that the bank shall forfeit all interest upon these overdrafts but not that, because of the usury in them it shall forfeit interest in other debts which have had no usurious origin, nor have of themselves become usurious at any time during their history.

We have examined the cases cited in the appellant's brief with care, as well as many other cases, and we find no case like the one at bar. The cases are all dealing with and the language of the courts must be so coustrued to apply to a state of facts where the usurious loan has been renewed and *its identity preserved throughout.* Thus, many of the cases deal with a state of facts like this—the borrower at the outset borrows, say $3,000, from the bank, and gives his note in evidence of that loan. An excessive rate of interest is
58 charged. The loan is renewed a number of times and at each renewal further usury is exacted, or the usurious interest is added to the original principal, and a new note taken for this enlarged principal. Finally, upon action brought upon the note, the entire transaction is laid bare, and it appears that there is but one original debt which the original taint has preverted throughout, but no case has been urged where the taint of one debt has been spread over upon another debt not usurious, although it may have been embraced or consolidated in some subsequent renewal with the usurious debt. On the contrary, there are intimations in several cases that such a construction of the act is too drastic.

Thus in Farmers & Mechanics Bank *v.* Hoagland, 7 Fed., 159, cited in the opinion, the action was upon two notes, one for $3,618, and the other for $3,740.50. Each of these notes was the last re-

newal of a preceding series, the originals of which were each for $3,000, some five years prior in time. Each note had been renewed nineteen times and the usurious interest charged at the several renewals sometimes was paid, sometimes was included in whole or in part as new principal in the new renewal notes. The bank brought action upon these last notes and the question was raised whether it could recover any interest at all. The opinion was written by Justice Acheson, for whose opinion the appellant in his brief seems to have high respect. It reads:

"The authorities therefore are decisive against the right of the plaintiff to recover any interest whatever upon the usurious transactions. It is to be added, however, that *one of the notes in suit includes an item of indebtedness of* $102 *growing out of an independent matter.*

Upon the demurrer and under the stipulation of the parties, let final judgment be entered for the plaintiff, the judgment to include, first, the face amount of the original notes, to-wit, $3,000, without interest; and *second, the sum of* $102, *with interest on the latter sum to be computed by the clerk.*"

This extract from this opinion we think properly interprets the spirit and intention of the national backing act, and that is that there shall be no interest upon any debt tainted with usury, but there shall be interest upon such portions of the indebtedness as are not usurious and which may be separated. In that case, $102 had been included in one of these renewals. It was not apparent from the renewal note itself, but only became so after the court had opened the entire transaction back through the nineteen renewals of the original debts, and it then became apparent that somewhere along the line of these renewals, an innocent and unobjectionable debt had been consolidated with an usurious one, but for that reason, interest was not lost upon the unobjectionable debt. So here we urge that applying the same principle, when this $20,000 note is set aside, and when the $17,500 note is likewise set aside, and it appears that there is left the Mason indebtedness of
59 $15,000 free from all objection of usury in itself, but coupled in these later notes with an objectionable and usurious other debt, that the only logical conclusion for the court to come to is that having the right to so inspect the ultimate facts of these debts it must separate the good from the bad, punish the plaintiff for that portion wherein it has transgressed the law, but not punish it for matters where there has been no transgression. In other words, there should be an accounting taken to ascertain the amount of the Mason indebtedness with interest to date, and judgment for that amount should be awarded to this plaintiff. So also with the note for $2,500.

There are numerous authorities which bear out this interpretation of the act. Thus in Burnhisel *v.* Firman, 22 Wallace, 170, Mr. Justice Swayne said:

"It is a rule in equity that an incumbrance shall be kept alive or

considered extinguished as shall most advance the justice of the case.

The application of this principle occurs most frequently in cases of usury. It is well settled that if a security founded upon a prior one be fatally tained with that vice, and the prior one were free from it but given up and cancelled, and the latter one thereafter be adjudged void, the prior one will be revived, and may be enforced as if the latter one had not been given. The cases to this effect are very numerous. A vendor's lien may be revived under the same circumstances. *In the same suit, where there is a failure to recover upon the void security, the valid one, on account of which it was given, may be enforced.*"

In Farmers' Bank *v.* Joslyn, 37 N. Y., 353, it was said:

"The infected contract did not absolve the mortgagor from his antecedent obligations, nor did it impair the rights of the plaintiff under a prior and valid agreement. It is true that the usurer is not permitted, at his own election, to allege his illegal act, as a ground for re-instating an old security; *but it is equally true that a party, who claims to be the victim of exaction, cannot avail himself of the invalidity of a later contract, as a shield from liability on one of earlier date, which was honest and free from vice.* (Brown *v.* Dewey, 1 Sandf. Ch., 57; Swartout *v.* Payne, 19 Johns., 294; Billington *v.* Wagner, 33, N. Y., 31; La Farge *v.* Harter, 5 Seld., 241; Crane *v.* Hubbell, 7 Paige, 413.)"

In Smith *v.* Heath, 4 Daly, (N. Y.), 123, it is said:

"Where a note is made up in part of a pre-existing valid debt, and in part of the usurious interest on another account, the note is not void, but the maker is entitled to an abatement thereof to the extent of the usury."

See also:

Mahn *v.* Hussey, 28 N. J. Eq., 546.
Jackson *v.* May, 28 Ill. App., 305.
Brannock *v.* Brannock, 10 Ired. (N. Car.), 428.
McFerrin *v.* White, 6 Coldw. (Tenn.), 449.

There are also very numerous authorities to the effect that "where a debt is valid and free from usury in its inception, the courts
60 unanimously hold that it cannot be vitiated or destroyed by any subsequent usurious agreement in respect to it, such as the giving of security, extending time of payment *executing a new form of obligation*, or by any other transaction tainted with usury."

So also it is held that "after a valid debt has been changed in form and made the subject of a usurious agreement, the creditor ought not to be allowed, on his own motion, to disregard the new agreement and sue upon the old debt. *The right to enforce the debt may be said to be in abeyance until the debtor has elected to set up the defense of usury against the substituted contract.*

In Gaither *v.* Farmers' Bank, 1 Peters, 37, the Supreme Court of the United States said:

"For the rule cannot be doubted that if the note be free from

usury in its origin no subsequent usurious transactions respecting it can affect it with the taint of usury."

In Ham *v.* Dekater, N. J. Eq., 1890; 20 Atl. 657, it is said:

"It is well settled that in every such case where the original transaction is outside of the statute, no subsequent agreement can bring it within. Donnington *v.* Meeker, 11 N. J. Eq., 362; Smith *vs.* Hollister, 14 N. J., Eq., 153; Conover *v.* Hobart, 24 N. J. Eq., 120; Sloan *v.* Sommers, 14 N. J. Law, 509; Walter *v.* Lind, 16 N. J. Eq., 445; Ware *v.* Thompson, 13 N. J. Eq., 66."

In Rice *v.* Welling, 5 Wend., 595, it is said:

"It has been repeatedly held that where a note or other security is given for a pre-existing valid debt, reserving illegal interest or containing an usurious premium for forbearance, although the security is void, the antecedent debt is not extinguished, and may be recovered in the same action under the common counts, if it is of a nature to which those counts are appropriate. The statute of usury renders void all bonds, bills, notes, contracts, or assurances by which there shall be reserved above the rate of seven per cent. This provision relates wholly to the contract, and makes that utterly void; but if there was once a valid subsisting debt, that cannot be destroyed by a void or invalid security; nothing is better settled; the following are a few of the cases to that point: 1 H. Bl., 462; 7 Mod., 119; 2 Taunt, 184; 3 Burr, 1081; 3 Camp., 119; 19 Johns., R. I., 150, 294; 2 Caines' Cases in Error, 82; Sir Th. Raym., 196; 4 Burr. 2253; 1 Saund., 294; 11 Mass. R., 359; 8 Cowen 77, 40."

See also 27 Am. & Eng. Ency. of Law, page 947 and numerous authorities therein cited.

Under the law it is well settled that this plaintiff, notwithstanding the usury contained in the later notes for $17,500 and $20,000, could still maintain its action upon the Mason debt or Mason note to recover interest in accordance with its terms to the present time.

See authorities in Respondent's Brief, page 20, and *supra*.

If that can be done, there seems no logical reason why the same result should not be reached in this action where the court undertakes to ascertain the actual indebtedness between the parties.

61 In The Moniteau National Bank *v.* Miller, 73 Mo., 191, this court said:

"When renewal notes have been given in continuation of *the same original loan*, the taint of usury in the transaction attaches to all such renewals and when the bank sues on the last renewal note, the borrower is entitled to credit for all the interest paid by him on the *loan* from the beginning and not merely to the excess above the legal rate."

This we submit is the proper construction of the act and that is that each *loan* must be dealt with by itself.

So also in First National Bank *v.* Stauffer, 1. Fed. at page 189, it is said:

"It is thus declared that the effect of a mere stipulation for ille-

gal interest by a national bank is to deprive it of the right to recover more than the *sum lent*, without interest."

And in Overholt *v.* Bank, 86 Pa., St. 490, and Cake *v.* Bank, 86 Pa., St. 303,

Cited in Appellant's Brief, p. 18, this language is used:

"Where there has been a series of renewal notes given for the continuation of the *same original loan*, the taint of usury in the first transaction follows down the descent through the entire line."

But it is urged that upon a literal reading of the national bank act, we find that there shall be a forfeiture of the entire interest which the *note, bill or other evidence of debt* carries with it and that for that reason, the bank must forfeit all interest on these notes, regardless of what they are composed.

It is the rule, however, of the decisions that the usurious note is void, having been given without consideration and that the court will not regard the note longer than to ascertain that there is usury in it, at which point the note is set aside and further inquiry made to find the original source of the debt. When that is done, as for instance, in the Hoagland case, *supra*, it was found to be two notes for $3,000 each, it is declared that these original notes shall bear no interest at all, but the banking act does not say that if back in the history of the transaction, there is a debt not usurious in its origin, nor in itself, except by contact with other usurious debts, the entire interest on all debts shall be forfeited.

The substance of the whole matter is that under the banking act, the inquiry must be made to locate the usurious *debt* regardless of the form in which it exists and regardless of the renewals through which it has passed. When that is found in its original form or evidence of debt, that particular evidence of debt bears no interest, but the purpose of the act was not, and has never been, construed to be so drastic and harsh as to forfeit interest upon debts not usurious in themselves, even if associated in a void renewal with an objectionable debt.

62 Looking at the matter from the standpoint of the borrower's action to recover double the usurious interest paid, as provided by section 5198, would it be urged for a moment that Donnell would have a right of action against this bank for all of the interest which had accrued since December 29th, 1893, if he had paid it on the Mason note, merely because of the minute sums of excessive interest charged on his overdraft? Yet if the court's opinion is right, such a right of action might be urged and the penalties falling upon this bank would be unbearable and far in excess of any intention of the framers of the banking act. It would be penalizing it because of one sin or infraction of the law, in matters wholly outside of the objectionable act and reaching far beyond it.

These considerations lead to this final analysis of the case:

The notes for $20,000 and $2,000 of April 29th, 1896, because of the usury found in them are void. They are therefore disregarded.

The note for $17,500, of July 12th, 1895, because of the usury found in it is void. It is therefore disregarded.

The note for $2,500, of October 1st, 1895, contains no usury. It, therefore, should be enforced according to its terms.

The Mason note for $15,000 contains no usury. It, therefore, should be enforced with interest from December 29th, 1893.

The balance credited on July 12th, 1895, to Donnell's account of $230.50, with simple interest, should be enforced.

The balance of $2.42 credited to him on April 29th, 1896, should also be charged against him.

The overdrafts of July 12th, 1895, and April 29th, 1896, aggregating in principal the sum of $1,349.05, should be enforced but without interest.

That this is the logical result follows from these reasons:

By the bank act, in case there is usury in the evidence of debt, the interest is forfeited.

This upon a strict construction would mean no more than that the interest on the $20,000 and $2,000 notes is forfeited. But when this position was urged the Supreme Court of the United States in Brown *v.* National Bank, 169 U. S., 416, held that the last renewals were void and the forfeiture should extend back to the origin of the usurious transaction.

Now, applying this reasoning to the language of the banking act, it means that the interest on the first usurious transaction as well as all the renewals of it shall be forfeited.

The first usurious transaction was the $17,500 note, for at that time the usury in the overdrafts was put into this note.

63 But under the decision of Burnhisel *v.* Firman, 22 Wallace, 170, *supra*, when the $15,500 note is also set aside, we find that it is made up of the Mason note and the usurious overdrafts. The Mason note was always free from usury and no subsequent transactions could impair it. (Gaither *v.* Bank, 1 Peters, 37, *supra.*) So, therefore, there having been no excessive interest charged on the Mason note, the interest which it bears cannot be forfeited. It is not an usurious "evidence of debt."

The same rule applies to the $2,500 note.

The renewals having all been set aside, we stand on July 12th, 1895, with the Mason note on one hand and the overdrafts on the other. Each is distinct from the other at this date.

Because of usury in the overdrafts they bear no interest.

Because of no usury in the Mason note, it must bear interest. "No subsequent usurious transacting respecting it can affect it with the taint of usury."

Gaither *v.* Bank, *supra.*

The renewals being disregarded the banking act requires a judgment to be entered for the principal of the usurious debt without interest. But this court has rendered judgment only for the principal of the Mason note, which, prior to the $17,500 note, had no contact with any usurious transaction. Having disregarded the $17,500 note, and gone back in time, of that note, the court renders judgment for its component parts. One of these is a wholly inno-

cent transaction and must bear interest; otherwise there would be a forfeiture of interest upon a good debt because of *subsequent* usurious transactions involving it, which cannot be done.

II.

The court in the opinion says:

"There can be no question, we think, as to the correctness of defendant's contention, that in charging him one per cent. a month upon the overdraft of June, 1893, to July 1895; in *compounding semi-annually the interest in the Mason note* and in again charging him one per cent. a month on the overdraft from November, 1895, to April 29th, 1896, plaintiff was guilty of exacting and reserving usurious interest, etc."

Appellant in his brief (III, p. 7), urged that because of R. S. Mo., 1899, 3711, relating to compounding of interest, plaintiff could not compound the interest upon the Mason note oftener than once per year. The court seems to have taken appellant's view and in so doing overlooked the fact that in dealing with the interest contracts of a national bank the State usury laws must be laid aside and recourse had to the national act to determine the question of usury and the penalty therefor.

64 The State law fixes the rate of interest but in no other respect does it bear on the case. That rate in this instance is eight per cent. per annum, and the State law inserts that rate into the national banking act, so far as this case is concerned, *but it does not insert any provision concerning the compounding of interest nor does it make the national banking act say that parties shall not compound interest*, nor does it prescribe any penalty for compounding interest.

This is recognized in Haseltine *v.* Bank, 183 U. S., 132, and Bank *v.* Haseltine, 155 Mo., 62, 65.

In Farmers' Bank *v.* Dearing, 91 U. S., 29, it is said:

"*The definition of usury* and the penalties affixed thereto must be determined by the national banking act and *not by the law of the State*."

And again:—

"Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive."

Appellant recognizes this rule in his brief (p. 6), yet he would apply the State law relating to compounding of interest to prove that the Federal law has been violated. He would apply the punishment defined by the national act for an offense created by the State law, and the opinion of the court carries the error into effect.

The banking act is silent upon the matter of compounding, leaving it to the parties to see that they do not exceed the legal rate allowed by the State wherein the bank is located. Applied to this case, Donnell and the bank could agree as they chose about compounding interest, provided their agreement, when carried out, did not carry the rate beyond eight per cent. per annum.

A parol agreement to pay interest upon interest is valid.
First Nat'l Bank *v.* Fenn, (Iowa), 39 N. W., 279, and authorities cited under parts I and II, Respondent's Brief.

This agreement was made concerning the semi-annual installments of interest upon the Mason note.
Report referee, abstract, p. 53.

And according to the provisions of the national banking act there was no usury in it, because as appellant admits (App. Brief, p. 14), the *the* amount charged did not exceed seven and one-half per cent. In other words, prior to the execution of the note for $17,500 (which appellant says was usurious charge No. 1.), this association (to paraphrase the banking act) did not take, receive, reserve or
65 charge on the Mason note interest at a greater rate than that allowed by the laws of the State of Missouri.

This being true, the question whether it compounded the interest on the Mason note or not is wholly beside the case. Appellant, in his brief says, (p. 13), that the Mason note at simple interest from December 29th, 1893, to July 12th, 1895, at seven per cent. would equal $16,61[illegible].96, but that the bank, by compounding, charged $60 more and that "the compounding was in violation of the statute (R. S. Mo., 1889, sec. 5977; R. S. 1899, sec. 3711)."

If this were a contract governed by this State statute, such might be the case, but as before urged, we are concerned now with the restrictions placed upon this bank's powers by the national act and that law contains no prohibition upon the agreement made by Donnell and the bank for the computation of this interest. The law in question made no contract for interest usurious unless it exceeded eight per cent. per annum. The Mason note figured at eight per cent. from December 29th, 1893, to July 12th, 1895, would equal $16,843.29, or $170.63 more than the amount claimed by the bank. The bank was therefore well within the law and when this item was carried into the note for $17,500 on July 12th, 1895, it was no more usurious than the original principal of $15,000. The vice found in the note for $17,500 was in placing in it the objectionable overdraft and for that reason all interest on the $17,500 note is stricken out. This, however, does not warrant the court in reaching back *anterior* to the commission of the usury and striking out $1,672.76 of lawfully earned interest on the Mason note to which there is no objection. In determining the amount of the judgment the figures should have been thus:

Amount of Mason note.....	$15,000
Interest Dec. 29, '93, to July 12, '95.....	1,672.76
Principal of overdraft July 12, '95.....	474.24, etc.

Appellant says in his brief (p. 14): "Having contracted to carry the loan for seven per cent., it was unlawful for plaintiff to exact seven and one-half by compounding." How unlawful? Possibly,

under the State law the agreement between Donnell and the bank in this regard would have violated the provisions regarding compounding but even that law does not say that such agreement would be usury. Unauthorized compounding is not usury, unless the result exceeds the legal rate.

Thus, in vol. 16, Am. & Eng. Ency. of Law, (2nd ed.), 1074, it is said:

66 "For the purpose of anything approaching a clear comprehension of this very difficult subject, it will be necessary to observe at the outset a distinction, rarely made plain by the cases, between interest compounded periodically and simple interest on deferred installments of interest after payment should have been made. All interest on interest is frequently designated compound interest, but interest compounded annually or periodically involves a different method of computation and a different result from mere simple interest on annual or periodic interest. By the former method, interest on interest, and so on, *ad infinitum*, will bear interest, while in the latter case it is only the interest on the original principal sum upon which interest is given."

In Wilcox *v.* Howland, 23 Pick., 167, the court said:

"The result of the doctrines upon this subject seems to be that a contract to pay compound interest is not usurious or void."

See also Kellogg *v.* Hickok, 1 Wend. 521; Connecticut *v.* Jackson, 1 Johns. Ch., 14.

But the measure in this regard is the banking act and not the State law and when Donnell and the bank made the agreement referred to and found as a fact by the referee, they violated no provision of the banking act. Therefore there was nothing unlawful about this computation up to the date of the $17,500 note.

Thus in Brown *v.* National Bank, 169 U. S., 416, the court said:

"No matter how many renewals may have been made, if the bank has charged a greater rate of interest than *the law*" (*i. e.* national banking act,) "*allows*, it must, if the forfeiture clause of the statute be relied on and the matter is thus brought to the attention of the court, lose the entire interest which the note bears or which has been agreed to be paid."

The law referred to allows eight per cent. per annum and the agreement of the parties does not exceed the rate.

Again in Sanguinette *v.* Webster, 153 Mo., 373, it is said:

"The right to contract for interest is a privilege conferred by the Government and does not exist outside such laws."

Applied to this case, the right is conferred upon national banks by the national banking act and not by the State law, and therefore the court erred in applying the State law with its penalties to this bank.

Appellant cites numerous cases to the effect that "the taint of usury in the first transaction follows down the descent through the entire line."

But lawful interest earned prior to the first taint of usury cannot

be forfeited and so the interest earned and charged on the Mason note prior to the date of the $17,500 note cannot be tainted by the subsequent transaction of putting into that note the objectionable overdrafts that had been running prior to the date of the $17,500 note.

For these reasons we submit that the judgment is erroneous in striking out the item of $1,672.76 of interest on the Mason note.

67 III.

For the same reasons the court erred in its opinion in striking out the interest earned by the $2,500 note from October 1st, 1895, the date it was executed, to April 29th, 1896, the date it was cancelled.

Appellant on page 21 of his brief makes the following concessions regarding this note:

"Upon the note of October 1st, 1895, for $2,500 at seven per cent., defendant makes no question. The amount it represents was paid to defendant or for his benefit and to the interest charged upon it, defendant could make no defense were it not for other transactions."

The "other transactions" referred to as shown by appellant's brief are those later transactions complained of in making up of the notes for $20,000 and $2,000 on April 29th, 1896. In other words, transactions which occurred after the $2,500 note was cancelled and after it had legally earned $101.92 of interest. The effect of the court's opinion in this regard is the same as is complained of concerning the interest on the Mason note prior to the execution of the note for $17,500. The court reaches back and strikes out interest which is of itself not usurious, but because of usurious transactions had by the party with *subsequent* notes and in *subsequent* transactions.

The penalty imposed by the national banking act is that all the interest which the note bears shall be forfeited. This does not mean that all of the interest earned by the previous note not usurious shall be forfeited. The taint of usury cannot reach further back than its origin. The authorities cited in appellant's brief are all to the effect that when this taint appears in the note, from that point on down the transactions are tainted. But the court, in its opinion, has gone higher than the source of this taint and condemns transactions against which even the appellant makes no complaint. The error of the appellant is that because of the unlawful transactions claimed to have occurred on April 29th, 1896, at which time the $2,500 note was cancelled, the sins committed on that date extended back to the beginning of this $2,500 note. This is clearly error, because this note never came into contact with any usurious notes or debts until it was merged into the renewals on April 29th, 1896, and we urge that the respondent should have been awarded the said sum of $101.92 of interest on this indebtedness in the final judgment.

IV.

Finally it is urged that the judgment of the court is unduly harsh and drastic upon the plaintiff bank.

In the case of Duncan *vs.* First National Bank of Mount Pleasant, referred to on page 71 of the opinion in Haseltine *vs.* Bank, 155 Missouri, it is said:

"From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final pay-
68 ment of the principal, or up to the time of entering judgment, there is a *locus penitentiæ* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it and lessen the principal. Up to that time he may make his election."

So also in Stevens against Lincoln, 7 Metcalf, 528, it is said:

"In regard to the payment of $1,458.91, whether this was a payment of the usurious interest or a part of it, we are of opinion that while the usurious interest is unpaid, there remains the *locus penitentiæ;* that the party may relinquish it, and recover for the balance of his debt—the contract not being rendered void by the statute."

The same rule is affirmed in Saunders *v.* Lambert, 7 Gray, 486.

In Wright *v.* Laing, 3 B. & C., 169, also quoted with approval in the Haseltine case, *supra.*, it *it* said:

"Because peradventure the lender might repent the illegal bargain and refuse to receive the full amount of his second bill and the law will allow him the opportunity of doing so, that he might not be deemed a receiver of the usurious interest, without clear evidence that he had not only bargained to receive, but had actually received such interest."

By the opinion of the court the judgment of the lower court is reversed and the case is remanded to the lower court with the explicit direction to enter the judgment set forth upon the final page of the opinion. This we submit is not the usual practice. All opportunity, such as is usually given to litigants to amend their pleadings upon a second trial or to introduce new or additional proof to correspond to the law laid down in the opinion, is denied this bank. No *locus penitentiæ* is conceded to it, although such an opportunity, it is admitted, is always afforded before the entry of final judgment or the actual receipt of the usurious interest.

The opinion of the court sets aside the judgment rendered below and there is now no judgment in the case. The record stands as if the suit had not been tried and under the authorities cited we can see no just reason why this plaintiff should receive a different or more severe punishment than that accorded to the ordinary litigant or even to the ordinary usurer.

Certainly the facts contained in the record do not place this bank without the pale of the law, but upon the contrary, if there is an opportunity under the law regulating a case of this character for repentance before the final day of judgment, such an opportunity should be

afforded to this plaintiff. A reading of the facts admitted by the record discloses that this bank carried Donnell for a number of years, constantly extending to him its assistance and upon doubtful security, at least real estate security difficult to realize upon, paying his taxes and extending to him every courtesy in its banking business; permitting him to constantly overdraw his account and even going so far in their desire to protect him and to carry his loans
69 as to violate the national banking act upon several occasions and to permit him to borrow more than ten per cent. of its capital. It may be conceded for the purpose of this argument that the penalty charged upon the overdrafts was usurious, but there is no evidence in this record that it was the purpose of this bank by doing so to over-reach or to punish Donnell or to deal with him in any different manner than any of its other customers and the president of the bank himself, upon the witness stand, said that he had on several occasions received the same penalty at the hands of his own bank. In other words, it was a rule, whether it was good or bad, which was not made to punish Donnell, but applied generally to all customers of this bank, and to all of the banks in Kansas City. Outside of this practice we earnestly insist that there was and is no usury in the Donnell notes. The referee found none and the trial judge found none. Had the referee on the other hand convicted the bank of usury, it would then have had an opportunity, before the entry of judgment, to release its unlawful claim and recover the balance of its debts. Had the trial court convicted it of usury, it would have had a similar opportunity before final entry of judgment. Neither of these tribunals having so found, it was justified in asserting that it was not guilty of usury and therefore there was nothing for it to repent of.

Upon the entry of the opinion in this court for the first time does it appear that the charges made by Donnell long after the transactions complained of occurred and after the suit was brought, contained in them substance of fact and therefore we urge that there being in this record no reason to punish this plaintiff beyond the ordinary rules of law, that this one and additional rule be applied to it and that if the court overrules the other grounds of this motion and adheres to its construction of the law, the respondent be awarded an opportunity by the remanding of this cause for a new trial to relinquish, if it be so advised by its counsel in the light of the opinion of the court, the usury found in its account and recover that which it is justly entitled to.

WARNER DEAN, McLEOD & HOLDEN,
Attorneys for Respondent.

70 And which said motion to transfer this cause to court in banc is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, Division No. 2.

THE CITIZENS NATIONAL BANK OF KANSAS CITY, Missouri, Respondent,
vs.
M. S. C. DONNELL, Appellant.
No. 9635.

Motion by Respondent to Transfer Cause to Court in Banc.

Now comes The Citizens National Bank of Kansas City, Missouri, respondent, and moves the court to transfer this cause to the court in *banc* for the reason that it, the said respondent, by the terms of the opinion filed in this division, on October 20th, 1902, is the losing party, and there is involved in said cause and in the opinion, a Federal question, and therefore under the provisions of section 4, of the amendment of 1890, to article VI, of the constitution of the State of Missouri, this cause should, upon application by the losing party, be so transferred.

I.

In as much as the decision of this controversy requires an interpretation of sections 5197 and 5198, of the national banking act, and the determination of a right claimed by respondent to be exercised under one of the laws of the United States in the transaction of respondent's business, a Federal question is involved. It is a case which is reviewable by writ of error in the Supreme Court of the United States, under section 709, of the Revised Statutes of the United States for the same reason, and should therefore, receive the consideration of the full bench of this State.

Central Bank *v.* Haseltine, 155 Mo., 58.
Haseltine *v.* Central Bank, 155 Mo., 66.
Haseltine *v.* Central Bank, 183 U. S., 130.
Central Bank *v.* Haseltine, 183 U. S., 132.

WARNER DEAN, McLEOD & HOLDEN,
Attorneys for Respondent.

71 And afterwards to-wit, on the 18th day of November, 1902, the further following proceedings were had in said cause, viz:

CITIZENS NAT'L BK., Resp.,
v.
M. S. C. DONNELL, App.

Now at this day, the court having fully considered and understood the motion heretofore filed to transfer this cause to the court in banc, doth order that said motion be sustained.

And afterwards to-wit, on the 29th day of January, 1903, the further following proceedings were had in said cause, viz:

CITIZENS NAT. BK. K. C., Resp.,
v.
M. S. C. DONNELL, App.

Come now the said parties by attorneys, and after argument herein, submit this cause to the court.

And afterwards to-wit, on the 4th day of March, 1903, the further following proceedings were had in said cause, viz:

THE CITIZENS NATIONAL BANK OF KANSAS City, Missouri, Respondent,
vs.
M. S. C. DONNELL, Appellant.
} Appeal from Jackson County Circuit Court.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Jackson county circuit court rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Jackson county circuit court for further proceedings to be had therein, in conformity with the opinion of this court herein delivered, and that the said appellant re-
72 cover against the said respondent his costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, Division No. 2, October Term, 1902.

THE CITIZENS NATIONAL BANK OF KANSAS CITY, MISSOURI, Respondent,
vs.
M. S. C. DONNELL, Appellant.

After the issues in this case were made up, the court in pursuance of an agreement between the parties, did on the 15th day of January 1898, make an order referring the cause and all issues therein to R. E. Ball, Esq., an attorney of the Kansas City bar, as referee, to hear and decide all the issues therein; who, in pursuance of said order, heard the evidence, made a finding of facts, and recommended judgment according to that finding.

He found the facts to be as follows:

"This action is on a promissory note for twenty thousand dollars given by the defendant to the plaintiff, dated April 29th, 1896, pay-

able on demand, and bearing interest at the rate of eight per cent. per annum from date until paid. At the same time, another note for the sum of two thousand dollars was given by the defendant to the plaintiff; payable on demand, bearing eight per cent. interest from date.

A suit on this second note of two thousand dollars is now pending in the circuit court of Carroll county, Missouri. The defense asserted in this suit is that of usury, the execution and delivery of the note being admitted.

As collateral security to the note here sued on, and to the two thousand dollar note mentioned, the defendant pledged with the plaintiff three other notes, secured by real estate, one for twelve thousand dollars, one for six thousand dollars, and one for ten thousand dollars. Nothing has been paid or realized on the securities on account of his indebtedness, except the sum of five thou-
73 sand dollars, received by the plaintiff on January 26th, 1898, from the sale of certain collateral property.

The history of the indebtedness, for which the note in suit and the two thousand dollar note mentioned were given, is as follows:

On the 29th day of October, 1892, the plaintiff, at the request of the defendant, purchased a note made by the defendant and Catherine Donnell, spoken of in the testimony as the "Mason" note, paying therefor the face of the note and accrued interest up to that date, and the defendant paying to the plaintiff the amount of the interest then due, leaving the defendant indebted to the plaintiff on account of said note, at that date, in the sum of fifteen thousand dollars. This note was overdue, and had coupon interest notes attached to it covering the interest that accrued before maturity.

By its terms it bore seven per cent. from maturity. It was intended by the parties, at the time of its purchase, that the bank should only take and hold the note temporarily for the accommodation of the defendant, but time went on and he was not able to pay the note.

In the meantime he carried a bank account with the plaintiff, and on July 12th, 1895, his bank account was and had, for some time prior thereto, been overdrawn several hundred dollars. At that time defendant, not being able to pay either his overdraft or the Mason note, and several payments of interest on the latter being in arrears, arranged with the plaintiff to give a new note, covering all of this indebtedness, and securing a small additional loan. On that date, he executed and delivered to the plaintiff his note for $17,500.00 payable on demand and bearing interest at the rate of seven per cent. per annum; the overdraft and all charges for interest on that and on the note being embodied in the new note.

On October 1st, 1895, he borrowed the sum of twenty-five hundred dollars from the plaintiff, for which he gave his note, payable on demand, and bearing seven per cent. interest from date until paid.

Nothing further was done between the parties until April 29th, 1896, when the defendant, being overdrawn at the bank and not

having paid either of the notes mentioned, or any interest
74 thereon, made a new arrangement with the officers of the plaintiff bank to give new notes covering the various debts then owing by him, as evidenced by the former notes and his overdrawn bank account.

According to the computation of these debts and the interest made at the time, the amount of the new notes given on April 29th, 1896, was as stated: One note for $20,000 being the one here sued on, and another, for $2,000, being the note sued on in the action now pending in the circuit court of Carroll county. The reason for taking two separate notes was, that the amount of the defendant's indebtedness, as claimed by the plaintiff, exceeded the amount for which, under the national banking act, the plaintiff was permitted to become creditor to any one individual, and the desire was to dispose of the surplus two thousand dollars of claimed indebtedness separately. At the time of the making of these two notes, the defendant received credit on his individual account, which left a small balance over and above the amount of his overdraft.

At the time of the making of the $17,500 note, July 12th, 1895, there was included in this note the original Mason note of $15,000, three semi-annual interest charges of $525.00 each, and interest on the overdue interest, from the time it was due, to the date of the note, and also an overdraft charge of $596.74, and an additional advance credited to the defendant on his individual account at the bank of $230.50.

In making this computation, it was agreed that the semi-annual interest due and unpaid on the Mason note should bear interest from the date it was due and it was so computed. This had been agreed to between the plaintiff and defendant at or about the time that the interest was due, and was agreed to by them at the time of making and signing of the $17,500 note. The overdraft included in this note of $596.74 contained charges on the actual amount overdrawn by the defendant of about one per cent. a month for the whole time of the continuance of the overdraft preceding the making of the note. These charges were evidenced by interest checks made out from time to time and charged to the defendant's account and returned to him on the balancing of his pass book, with other checks drawn by him.

At the time of the making of the note sued on and the
75 $2,000 note mentioned, to-wit, April 29th, 1896, these amounts were arrived at by computing the amount at that date of the $17,500 note of July 12th, 1895, and $2,500 note of October 1st, 1895, and an overdraft of the defendant on April 29th, 1896, of $919.90, together with a balance on his pass book of $2.42, which made in all $22,000. The overdraft item in this computation contained charges for some months previous of about one per cent. a month on the actual amount overdrawn.

In both of these settlements of July 12th, 1895, and April 29th, 1896, the parties intended to and did merge into the notes, then

made respectively, all of the indebtedness of the defendant to the plaintiff.

On July 12th, 1895, the item of overdraft as stated was $596.74. Of this amount $569.74 was the actual overdraft and the balance consisted of charges made monthly on account thereof.

On April 29th, 1896, the item of overdraft was $919.90; of this amount the actual overdraft was $876.36 and the balance consisted of the monthly charges. In each instance the whole amount of the note and the items of indebtedness which went into it, was figured between the plaintiff and the defendant and agreed to and the notes accordingly executed.

The defendant in each instance agreed to the interest charges and on overdue interest, and also knew of and agreed to the charges made on his overdrafts.

At the date of the two settlements made, on which the new notes were given, all the items of the then existing indebtedness of the defendant to the plaintiff, were by agreement merged together. Taking them altogether and charging interest per annum, without compounding, the rate is less than eight per cent.

Conclusions of Law.

Although the evidence taken and returned is voluminous, there is really no dispute in regard to the essential facts of the case. The controversy all arises in regard to the inferences that ought to be drawn from the undisputed facts and the conclusions of law that must result therefrom. The Mason note only drew seven
76 per cent. according to its face. The defendant and the plaintiff agreed when the semi-annual interest on that note was not paid that the over-due interest should bear interest, and this agreement was consummated by the giving of the subsequent $17,500 note. This was done, it should be remarked, in connection with the settlement of the overdraft of the defendant, then due.

I hold that it was competent for these parties to make and consummate that agreement without violation of the usury law so long as the amount of interest computed fell within the maximum legal limit of eight per cent. The same thing is true of the agreement made by the parties at the time of the execution of the note sued on in this case, and of the $2,000 note on which suit is pending in another court.

Counsel for both parties have furnished me with able and exhaustive briefs and have argued the question arising with great deal of ability and ingenuity. It is contended by plaintiff's counsel that both in the making of the $17,500 note and of the two notes bearing date of April 29th, 1896, the plaintiff made a new loan to the defendant and that those notes were not a renewal simply of the pre-existing indebtedness. I do not concur in this view. I do not doubt that the officers of the plaintiff attempted to put the transaction on that basis and did so in perfect good faith, but under the

authorities I am satisfied that the notes in question were, as a matter of law, simply renewals on new terms then agreed upon between the parties of the pre-existing indebtedness.

Counsel for plaintiff also contend that the charges made on the overdrafts of about one per cent. a month were not interest charges, within the meaning of the usury law, but were penalties imposed on the customer of the bank for overdrawing his account.

I do not agree to this contention. I think that these charges were essentially interest charges, and if this action were solely for a debt evidenced by that overdraft I should have no doubt that the making of these charges would preclude the plaintiff from collecting anything but the actual original overdraft. But the defendant, at each of the times in question, was indebted to the plaintiff in several forms by different notes and by his bank acount, and
77 in my judgment the merging of these different debts into one, the agreement to the charges of interest made, one with reference to the other, all had the effect in law of mingling the debts and charges so that the real inquiry should properly be, whether on the whole indebtedness the defendant had agreed, by the note in suit, to pay a greater amount of interest than it was lawful for the plaintiff to charge. This he did not do.

The agreement of the defendant to pay interest on the over due interest on the several notes made, preceding the making of the one in suit, was lawful, and when that was consummated by the signing of a new note, it was a good consideration for the new indulgence thereby obtained. It seems to me that the only question in this case is the effect on the note in suit of the charge made by the defendant of a usurious rate of interest on the overdraft which formed an item of both the $17,500 note and of the computation of the debt for which this suit is brought. I think, beyond any doubt, that those charges taken in and of themselves were usurious, but the overdraft, in each instance, formed a very small part of the consideration of the note. The law of forfeiture, according to all of the authorities, should be strictly construed, and when these parties, by mutual agreement, merged all these debts into one, and when the total effect of that merger fails to show *in toto* an illegal agreement, under the usury act, my opinion is that the law has not been violated and that the grave result of imposing a penalty of forfeiting all interest on all the items that entered into that note should not be visited on the plaintiff.

It seems clear to me, from all the authorities, by reason of the merger of these debts in the way stated, that there should be no forfeiture at all, but if any forfeiture should be had, it should only be of all interest charges on the overdrafts that entered into the note in suit.

The point is made that defendant's answer does not adequately plead usury, in that it does specifically aver the amount of usury charged and that entered into this specific note, and that
78 the proof also fails to disclose definitely the amount alleged to be usurious.

I think there is a great deal of force in this objection, but I have preferred to base my conclusion on the broader grounds stated.

I find the issues in the case for the plaintiff, and recommend judgment on the note for $20,000.00, with eight per cent. interest from April 29th, 1896, to the date of the rendition of the judgment, after crediting the payment of $5,000 on January 25th, 1898.

Respectfully submitted.

R. E. BALL, *Referee.*"

And thereafter, within four days from the time of the filing of said report and testimony, to-wit, on May 18th, 1898, the defendant filed his motion to re-refer said cause to the referee, which was overruled.

In due time defendant filed exceptions to the referee's report, assinging numerous grounds therefor, which are unnecessary to set forth.

And thereafter, to-wit, on July 2nd, 1898, the same being during the April term of said court, A. D. 1898, the court overruled the motion of defendant to re-refer said cause, and also overruled defendant's exceptions to the report of the referee and entered a judgment in favor of plaintiff; to which action, orders and rulings of the court the defendant at the time excepted and still excepts.

And thereupon a judgment was given and entered herein, as follows, to-wit:

"Now on this day comes plaintiff herein, The Citizens National Bank of Kansas City, Missouri, by its attorneys, Warner, Dean, Gibson & McLeod, and comes also defendant, M. S. C. Donnell, by his attorneys, R. B. Garnett and W. C. Forsee, and the motion of said defendant to re-refer this case, heretofore filed herein, coming on for hearing, the same is by the court taken up, heard and duly considered; and after argument of counsel, and due deliberation, the court overrules said motion to re-refer this cause.

And the exceptions heretofore filed herein by said defendant to the report of the referee, Hon. R. E. Ball, coming on regu-
79 larly for hearing, said exceptions are by the court taken up, heard and duly considered, and after argument of counsel thereon, and after due deliberation the court overrules said exceptions to the report of the referee and each and every one thereof, and the report of said referee heretofore filed herein is by the court taken up, heard and duly considered and said report of the referee in this cause is by the court duly and regularly confirmed in all respects, and the court upon said report of said referee, doth find all the issues herein for plaintiff and against defendant, and doth further find that on April 29th, 1896, said defendant, M. S. C. Donnell, for value received, made, executed and delivered his negotiable promissory note of that date to plaintiff herein for the sum of twenty thousand dollars ($20,000) with interest thereon from said last named date until paid at the rate of eight (8) per cent. per annum; and the court doth further find that on January 25th, 1898, after the commencement of this suit, said defendant paid the plain-

tiff the sum of five thousand dollars ($5,000) on said note leaving on said last named date a balance on said note from defendant to plaintiff the sum of seventeen thousand, seven hundred and eighty-two 4/100 dollars ($17,782.04), which last named sum, with interest thereon at the rate of eight (8) per cent. per annum from January 25th, 1898, is due and owing from said defendant to said plaintiff, together with its costs herein expended and incurred; and the court doth further find that said referee, Hon. R. E. Ball, was engaged for the period of ten days in the trial and consideration of this cause, and that he incurred an expense of seventy-four dollars and twenty-five cents ($74.25) for his stenographer to take the testimony before him as such referee.

Wherefore it is ordered, adjudged and decreed by the court that plaintiff herein, The Citizens National Bank of Kansas City, Missouri, have and recover of and from defendant herein, M. S. C. Donnell, the sum of eighteen thousand, four hundred and six 79/100 dollars ($18,406.79) together with interest thereon from this date at the rate of eight (8) per cent. per annum until paid, together with its costs herein incurred and expended; and the court doth
80 further order, adjudge and decree that said R. E. Ball, as referee herein, be and is hereby allowed the sum of one hundred dollars ($100.00) as compensation for his services herein, and that A. P. Barnett, the stenographer who took the testimony in the cause before said referee, be and is hereby allowed for his services as stenographer the sum of $74.25; and the clerk of this court be and is hereby ordered and directed to enter up and charge as costs in this cause the allowances herein made to said referee and stenographer, for all which execution shall issue herein.

After unavailing motion for a new trial, defendant appeals.

Sections 5197 and 5198 of the national bank act are as follows:

SEC. 5197. An association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate allowed by the laws of the State, Territory or district where the bank is located, and no more; except where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. Where no rate is fixed by the laws of the State, Territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, or other evidence of debt, has to run. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

SEC. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which

the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his
81 legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred.

Section 3705. Revised Statutes of this State provides that creditors shall be allowed to receive interest at the rate of six per cent. per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made. * * *.

Section 3706 provides that parties may agree, in writing, for the payment of interest, not exceeding eight per cent. per annum, on money due or to become due upon any contract.

Section 3711 provides that parties may contract, in writing, for the payment of interest upon interest, but the interest shall not be compounded oftener than once in a year.

Some criticisms are made by defendant on the report of the referee with respect to his finding of facts, but this court has always treated such a report as a special verdict, and refused to interfere unless there was no substantial evidence to support it. (Berthold *vs.* O'Hara, 121 Mo. 88; Utley *vs.* Hill, 155 Mo. 232; Smith *vs.* Baer, 166 Mo. 392.) That this court may if so inclined, review the finding of facts by the referee in cases of this character, and approve or disapprove it in whole or in part, is well settled, but it does not follow that it will do so. It is not so, however, with respect to the circuit court which has the power, and whose duty it is to review the finding of facts by a referee. Smith *vs.* Baer; Utley *vs.* Hill, *supra.*

But in order to a better understanding of the facts out of which this litigation grew it will not be inappropriate to state them more in detail than did the referee.

On October 29, 1892, defendant owed plaintiff bank $15,000 on the Mason note. On that day, defendant paid $175, interest on said note at the rate of seven per cent. per annum. This changed the semi-annual interest periods.
82 On June 29th, 1893, he paid $525 more, interest to that date. Defendant was unable to pay the next semi-annual interest due December 29th, 1893, and the then president of plaintiff, Mr. Seeger, to avoid charging off the Mason note as bad paper, on June 30th, 1894, put in the cash drawer a sight draft on defendant for $525, in favor of S. W. Campbell, cashier, and this draft was carried as a cash item until February 18th, 1895, when defendant, having funds, gave plaintiff a check for it.

In meantime, on or about June 1st, 1893, defendant's account with plaintiff began to be overdrawn. He says in his testimony that the bank consented to the overdraft, and this is not denied. On June 1st he was overdrawn $514.52 and on the 13th he reduced the overdraft to $473.52 and on the 22nd paid it. But for interest on this

overdraft for this time plaintiff inserted among defendant's check- a charge slip or check for $3.14 payable to "Int. or bearer" and signed "Chg. M. S. C. Donnell." This charge was at the rate of about one per cent. per month and was the beginning of a series of transactions of a similar nature. From June 30th, 1893, until July 13th, 1895, defendant's account was overdrawn in amounts ranging from $435.46 on the first named day, to $596.74 on the last. At the end of each month the plaintiff charged defendant one per cent. or more on his overdraft and put an interest charge slip among his checks and added this charge to the overdraft. This is shown clearly by the general account kept by plaintiff, introduced in evidence by it The interest charges on June 29th, 1895, had amounted to $122.50; the principal of the overdraft at that time was $474.24 and the defendant had been overdrawn from July, 1893, until July, 1895, only from $435.46 to $474.24, and the $122.50 represents the interest charged by plaintiff on $435.46 two years, or slightly over twelve per cent. per annum. No demand was shown to have been made for payment of the overdraft.

These interest charge checks were returned to defendant as vouchers.

On July 12th, 1895, this indebtedness was renewed. Plaintiff's president, Mr. Seeger, computed defendant's debt on that day to be as follows:

83 Note $15,000 and interest 7 per cent. from December 29th, 1893.

Semi-annual int. due June 29th, 1894	$525.00
Int. to December 29th, 1894	18.37
Semi-annual int. due December 29th, '95	525.00
Int. to June 29th, 1895	37.39
Semi-annual int. due June 29th, 1895	525.00
	1,630.00
Note	15,000.00
Am't due June 29th, 1895	16,630.76
Int. to July 12th, 1895	42.00
	16,672.76
Overdraft	596.74
	17,269.50
Bal. credit acc't	230.50
Am't new notes	$17,500.00

This computation was by defendant introduced in evidence. It shows a compounding of interest every six months in violation of R. S. 1889, sec. 5977 (R. S. 1899 sec. 3711) and the charge of interest upon interest amounting to $59.93.

To the total amount of principal and compound interest claimed to be due on the Mason note, $16,672.76, was added the overdraft consisting of principal $474.24 and one per cent. per month interest thereon, amounting to $122.50, and to this was added a credit on general account of $827.24 which eliminated the overdraft and left $230.50 to be checked against. These items aggregated $17,500.00, and for this defendant gave his note due on demand with 7 per cent. interest from that date. Plaintiff retained the Mason note as "collateral security." The $17,500.00 note was introduced in evidence, being attached to the papers in the Carroll County case.

Thus on July 12th, 1895, the $17,500.00 note was executed and it was composed of the principal of the Mason note..		$15,000.00
The usurious interest calculated therein.....		1,672.76
	The principal of the overdraft.....	475.24
84	The usury charged therein.....	122.50
	And a small credit account of.....	230.50
		$17,500.00

So that deducting the interest $1,672.76 and $122.50, in all $1,795.26, we have left $15,704.74, the amount of the principal on July 12th, 1895.

On or about September 14th, 1895, defendant made three additional notes for $12,000, $6,000 and $10,000 respectively, due five years from date with interest at 6 per cent. per annum, in favor of W. H. Seeger, secured by deeds of trust on real estate. Seeger endorsed and transferred these notes to plaintiff and it is now holding them also as "collateral security."

On October 1st, 1895, defendant made another note for $2,500, due on demand, with 7 per cent. interest from date, and it was credited to defendant on the books of the bank. At this time defendant's account was overdrawn $267.30, including the usurious interest on the same calculated at the rate of one per cent. per month, compounded monthly, and while defendant was given credit on plaintiff's books for $2,500, his net credit was only that amount, less the amount of overdraft and usury calculated therein, and as this usurious charge was taken out of the $2,500 note it infected the same with usury from its inception. Defendant so testified and it is not disputed.

"The $2,500 note of October 1st, 1895, was calculated in this way: Defendant testified before the referee as follows: Mr. Seeger, and I sat down to make this note; we calculated among ourselves the amount of money needed to pay taxes with, and such things, and figured it up and went to the book to see how much I was overdrawn and figured the thing up and wrote out a note for $2,500, and paid my overdraft out of it, and gave me credit of the balance of the money which I used in the payment of taxes on the property on which they held the mortgage. My overdraft on the 1st of October was $909.87. On September 30th, 1895, I was overdrawn

then sufficient for them to charge me $1.55 on my overdraft. They carried it down and calculated it in the $909.87. And Sep-
85 tember 1st my account was overdrawn $167.30. This was figured in at a little better than 12 per cent. per annum."

The referee then observed: "I think the answers heretofore have been that the interests checks that were put into these various notes were all those that preceded in date the making of the note, and when the next note was made, they included those which were between the date of the former note and that note. For instance, they make a note of $2,500, and up to that time certain interest checks have been returned, and, as I understand his answers, that $2,500 note includes the amount of the original overdraft and the interest checks that up to that time had been made."

"The WITNESS: Yes, sir."

Again: Mr. Fitzhugh, president of plaintiff bank, testifies on cross-examination:

"The indebtedness represented in the deposits was put into the notes. I want to say farther that there was deposits made by Donnell that took care of the overdrafts independent of any money loaned by the bank. If we placed to the credit of Mr. Donnell a note of $2,500 on October 1st, on an account which stood overdrawn $909.67, Donnell would receive credit for just what he received. The net credit would be the balance. He had overdrawn at that time only $268. The checks offered in evidence might have been paid after the $2,500 note went to his credit."

While Mr. Seeger, the former president, testified: "No overdraft or penalty entered into the $2,500 note," he explains himself and shows that this penalty did enter into the note. Continuing he says: "I loaned him $2,500 and put the whole $2,500 to his credit to take up his indebtedness." The indebtedness referred to, as shown by the record is in part these usury charges.

Defendant was obliged to overdraw again and from November 2nd, 1895, until after the execution of the note sued on his account was overdrawn. The bank on November 30th, charged him $1.70 interest and thereafter on the last business day of each month charged him one per cent. or more upon his overdraft and added it to the overdraft as before.

86 On April 29th, 1896, this overdraft including excessive interest was $910.10. The officers of the bank computed the $17,500 note and $2,700 note from their respective dates with 7 per cent. interest and added in the overdraft with its accumulated compounded interest, making the total $21,997.58. Defendant executed two notes payable on demand, one for $20.000 and the other for $2,000 with 8 per cent. interest from date. The $20,000 note is the instrument in suit. Plaintiff eliminated the overdraft and credited to defendant on its books $2.42 net.

On January 25th, 1898, certain of the real property described in the deed of trust securing in part the payment of the $6,000 "collateral" note was sold and $5,500 was the net proceeds, and the defendant notified the plaintiff to apply the fund to the pay-

ment of the said collateral notes for $6,000 but defendant applied it instead to payment of interest on the notes for $22,000 and the balance on the principal of those notes.

"And by agreement of parties a transcript of the general account of M. S. C. Donnell, as shown by the books of plaintiff, from October 14th, 1892, to May 1st, 1896, was introduced in evidence and attached to the report of the referee. It shows a continuous account and transaction between plaintiff and defendant between said dates, and that the note in suit and its antecedents are all a part of said continuous transaction. Every month defendant was charged interest at the rate of one per cent. per month compounding monthly on the overdrafts beginning in June, 1893, and culminating April 29th, 1896, in the $20,000 note in suit and in the $2,000 note in the Carroll county case.

These transactions show the following:

The Mason note upon which the interest was paid to December 29th, 1893	$15,000.00
July 12th, 1895, overdraft, less interest figured in the note of $17,500	474.24
July 12th, 1895, net credit on bank account	230.00
October 1st, 1895, credit by note of that date	2,500.00
April 29th, 1896, principal of overdraft	874.81
April 29th, 1896, credit on account	2.42
87	$19,081.97
January 25th, 1898, credit by proceeds of col	5,500.00
	$13,581.97

The balance of the note is interest.

There can be no question, we think, as to the correctness of defendant's contention, that in charging him one per cent. a month upon the overdraft of June 1893 to July 1895; in compounding semi-annually the interest in the Mason note and in again charging defendant one per cent. a month on the overdraft from November 1895, to April 29th, 1896, plaintiff was guilty of exacting and reserving usurous interest, entitling him under the national bank act to plead as a bar to plaintiff's recovery all interest carried by the $22,000 of notes, unless as was held by the referee that, *that* "the agreement of the defendant (although verbal) to pay interest on the overdue interest on the several notes made, preceding the making of the one in suit, was lawful, and, when that was consummated by the signing of a new note it was a good consideration for the new indulgence thereby obtained. It is however said for plaintiff that prior to the execution of the note for $17,500 the plaintiff did not take, receive, reserve or charge on the Mason note interest at a greater rate than that allowed by the laws of the State of Missouri.

"That this being true, the question whether it compounded the interest on the Mason note is wholly beside the case. It is conceded

that "if this were a contract governed by this State statute, such might be the case, but as we are concerned now with the restrictions placed upon this bank's powers by the national act and that law contains no prohibition upon the agreement made by Donnell and the bank for the computation of this interest. The law in question made no contract for interest usurious unless it exceeded eight per cent. per annum. The Mason note figured at eight per cent. from December 29th, 1893, to July 12th, 1895, would equal $16,843.29, or $170.63 more than the amount claimed by the bank."

But we are not inclined to agree to this contention, and think the position unsound. The legal rate of interest in this State, by whose laws in this respect this case is governed, is, in the absence of
88 an agreement in writing to pay a higher rate six per cent., (sec. 3706, *supra*) and the fact that the definition of usuary and the penalties imposed must be determined by the national bank act and not by the law of this State, as held in the case of Haseltine *vs.* Central Bank of Springfield, 183 U. S. 132, is immaterial, for whatever the unlawful interest charged by plaintiff may be called there is no escape from the conclusion that when plaintiff computed the interest on the Mason note which only bore interest at seven per cent., with rests on December 29th, 1894, June 29, 1895, and July 12th, 1895, three rests in seven months, it was guilty of taking, receiving reserving or charging a greater rate of interest than is allowed by the national banking act. And therefore the entire interest which the Mason note "carries with it" was forfeited, at the time it was computed into the note of $17,500. The bank had no right to charge any interest not allowed by the laws of Missouri. The banking act says so in plain words. The laws of Missouri did not permit the compounding of the interest on the Mason note oftener than once a year. Therefore, when the bank compounded the interest on the Mason note oftener than once a year, it did that which it was not allowed to do by the laws of Missouri, and in so doing violated the national banking act and subjected itself to the penalties therein provided.

The record shows that the $15,000 note bore interest at seven per cent. per annum and that notwithstanding this fact the interest was computed semi-annually, and, that on the 29th day of June 1894, there was computed six months' interest due thereon amounting to $525.00 and that interest was computed on the interest then due, at the same rate to December 29, 1894, amounting to $18.37. That on the day last named there was computed another six months' installment of interest amounting to $525, upon which there was computed interest at the same rate to June 29, 1895, amounting to $37.50, and at the time last named there was another installment of interest due on said note amounting to $525.00 all of which then amounting to $1,630.76 was added to the paincipal note of $15,000, the aggregate amount due on the day last named $16,630.76, which including in-
terest at the same rate for thirteen days amounting to $42.00,
89 overdraft for $596.74, and the bal. credit account of $230.50 amounting to $17,500.00 was the amount of the new notes.

There was no written agreement that interest upon interest or upon overdrafts was to bear any rate of interest at all, hence no higher rate than six per cent. could have been charged, and anything in excess of that was usurious under section 3706.

Section 5197, *supra*, provides that any association may take, receive and charge * * * interest at the rate allowed by the *laws of the State* * * * *where the bank is located and no more*, and we must look to its statutes to see what rate of interest may be charged, for it is only by statutory enactment that interest can in any event be charged and collected.

The national banking act restricts national banks in charging interest to the maximum amount allowed by the State, and provides that they shall charge "no more."

The referee in his conclusions of the law of the case said:

"That those charges taken by themselves were usurious but the overdraft in each instance formed a very small part of the consideration of the notes. That the law of forfeiture, should be strictly construed, and when these parties by mutual agreement, merged all these debts into one, and when the total effect of that merger fails to show in toto an illegal agreement, under the usury act, the law has not been violated and that the grave result of imposing a penalty of forfeiting all interest on all the items that entered into that note should not be visited on the plaintiff."

With respect to the interest charged against defendant on overdue interest he held that the agreement of the defendant to pay interest on the over due interest on the several notes made preceding the making of the one in suit, was lawful, and when that was consummated by the signing of a new note it was a good consideration for the new indulgence thereby obtained.

But this position is not sound, for it is well settled that a debtor may at or before the time of payment direct its application, and that the creditor must apply it as directed, but if the debtor
90 fail to make such direction when he might, the creditor may apply it as he pleases. It must, however, be made to a debt that is due in preference to one that is not due. There is an exception, however to these general rules, and that is, where the debt or part of it is usurious, the creditor cannot in the absence of special directions so to do from the debtor apply the payment to usurious interest or to any debt which the debtor is not bound to pay. Now in the case at bar the usurious interest was not paid but was carried along by way of renewal notes.

Defendant challenges the correctness of the conclusion of the referee from a legal standpoint, and insists that it is not sustained by authority. He contends that the referee was in error in holding that secs. 5197 and 5198, Revised Statutes, U. S., are not to be construed *strictly* but liberally.

In National Bank *v.* Dearing, 91 U. S. L. C. 35, in construing section 5198, it was said: "The 30th section is remedial as well as penal, and it is to be liberally construed to effect the object *of* Con-

gress had in view in enacting it. Ordway *et al. vs.* Central National Bank of Batto. 47 Md. 217.

In Brown's Executors *v.* National Bank, U. S. App. 7, it was said: "The legislative intent, we think, was to utterly destroy the interest bearing capacity of the instrument. The interdiction of a recovery of interest by the transgressing bank is salutary, and full effect should be given it."

And in Blitz *v.* National Bank, 87 Pa. St. 87, in speaking of the term "forfeiture" it was said: "It will be noticed that the word forfeiture is used, yet the uniform practice has treated this not as pure penalty, but as a defence which may be set up to the recovery of interest. The word forfeiture — viewed simply as conferring a right which may be asserted by the defendant."

It is admitted by the referee that the charges made by the plaintiff of an usurious rate of interest on the overdraft which formed an item of both the $17,500 note- taken by themselves were usurious. But he says that when these parties, by mutual
91 agreement, merged all these debts into one, and when the total effect of that merger fails to show in toto an illegal agreement * * * the law has not been violated." In arriving at that conclusion the referee must have proceeded upon the theory that because the $17,500 note bore seven per cent. only, that that purged the transaction of usury, but it is well settled that interest included in a renewal note and for which a separate note is executed does not thereby cease to be interest within section 5197.

In Brown *vs.* National Bank, 169 U. S. 416, it was held that — a bank which violates section 5198 *supra*, sues upon a note the debtor may insist that the entire interest legal and usurious, included in the note and agreed to be paid, but which has not been actually paid, shall be either credited to the note or eliminated from it and judgment given only for the original debt, with interest at the legal rate from the commencement of the suit. * * * The forfeiture declared by the statute is not waived or avoided by giving a seperate note for the interest or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on and the matter is thus brought to the attention of the court, lose the entire interest which the note bears or which has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest which the note, bill or other evidence of debt carries, or which was agreed to be paid, but which has not been actually paid.

"It is said that within the meaning of the statute, interest is paid when included in the renewal note, and when suit is brought upon the last note calling for interest from its date, only the interest accruing on the apparent principal of that note is subject to forfeiture. We think the statute can not be so construed. If, within the meaning of the statute, interest is "paid" simply by including it in the renewal note, it would follow that as soon as the usurious interest is

included in a renewal note, the borrower or obligor could sue the lender or obligee and recover back * * * "twice the
92 amount of the interest thus paid," when he had not in fact, paid the debt nor any part of the interest as such. This cannot be a sound interpretation of the statute. The words "in case the greater rate of interest has been paid," in section 5198, refer to interest actually paid as distinguished from interest included in the note and only "agreed to be paid." If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount to be paid in one year at ten per cent. interest, such a rate of interest being illegal and if renewal notes are executed each year for five successive years, without any money being in fact paid by the borrower—each renewal note including past interest, legal and usurious the sum included in the last note, in excess of the sum originally loaned, would be interest which that note carried or which was agreed to be paid, and not, as to any part of it, interest paid."

To the same effect are Overholt *vs.* National Bank, 86 Pa. St. 400; and National Bank *vs.* Hoagland, 7 Fed. Rep. 159.

The taint of usury in the first instance continues down the entire line. Cake *vs.* First National Bank, 86 Pa. St. 303.

The note for $17,500 of July 12th, 1895, being illegal in part the question is did it lose its interest carrying power? In Danforth *vs.* Bank, 48 Fed. Rep. 271, it was held that the forfeiture provided for by section 5198, *supra*, attaches to the instrument itself and the consequence adheres to it. And as it carries no interest, no interest thereon can be recovered. That the clause operates directly upon the bank and effects its power. That its power to collect interest under its statutory franchise is lost by the commission of the illegal act.

The contract entered into between plaintiff and defendant in conformity with the law of this State was valid, but all charges of interest against defendant in excess of that which is allowed by the laws of this State and in compounding interest upon usurious interest agreed to be paid by defendant was unlawful, and operated as a forfeiture by plaintiff to recover any interest on the note sued on.

But plaintiff says "between June, 1893, and April 30, 1896,
93 defendant's account with plaintiff was frequently overdrawn, and that the bank from time to time made small charges against his account in the nature of penalties, as it understood it, for the overdraft.

"That the amount of these charges, together with the existing overdrafts, were, from time to time, more than equalled — the money received by defendant from the bank at the time his loans were increased, and by a deposit of $1750, Feb'ry 18, 1895, and $35, Oct. 1, 1895."

And intimates that these matters might be equitable adjusted upon the principle that the equities are about equal. This however furnishes no justification or excuse for the admission that the bank made charges against defendant on his overdrawn account in the

nature of "penalties" which was simply another name for interest, and in excess of the rate allowed by law of this State.

On January 25th, 1898, certain of the real property described in the deed of trust securing in part the payment of the $6,000 "collateral" note was sold and $5,500 was the net proceeds, and the defendant notified the plaintiff to apply the fund to the payment of the said collateral notes for $6,000 but defendant applied it instead to payment of interest on the notes for $22,000 and the balance on the principal of those notes.

The note being in part usurious, it must be applied upon the principal debt rather than the unlawful interest, and the burden of showing that a partial payment was made upon the bank, and, in the absence of any finding by the referee upon this question it must be regarded as having been a general payment, and being such the bank was without authority to apply it or any part of it to forfeited interest, to a claim that had no legal existence. Danforth *vs.* Bank *supra;* Adams *v.* Mahan, 41 N. J. Eq. 332; Green *vs.* Taylor, 39 Pa. St. 361.

It is said by counsel for plaintiff in his additional citation of authorities, that "if, by compounding the limit prescribed by law is not exceeded, there is no violation of law, but if by compounding the limit is exceeded it is a violation of the law. Watson *vs.* 94 Meins, 56 Texas 451."

"The form of the contract is immaterial, no device to evade the law will be upheld by the courts. Mitchell *vs.* Napier, 22 Tex. 121; Crozier *vs.* Stephens, 2 Wilson Cir. Cases Ct. App. section 802. If this position is correct, and we think it is, it follows inevitably that the computation of interest upon interest at seven per cent., in the absence of a written agreement authorizing it, was in plain violation of the statute which under such circumstances only allow- six per cent.

It is shown by the record that at the time the $2,500 note was executed defendant's account with the bank was overdrawn and had been for some months prior thereto, and plaintiff charged defendant one per cent. per month on the overdrafts which is admitted to be usury, and included it in that note.

It appears that while defendant was credited ostensibly for this note the statement of the account shows that he only received credit for a net balance after deducting the overdrafts with usurious interest thereon. It thus appears that usurious interest was taken and reserved out of this note, and that it was usurious at the time of its execution.

While we have considered these notes which entered into the general account of the parties in order to show that each and every one of them constituting it since June 1893, was tainted with usury, we might as well have disposed of the case from a different standpoint, that is, that the long account is one continuous transaction, one running account, and that when any item of the account became tainted with usury it infected the entire transaction from that time. This view was taken of a similar case in Pickett *vs.* Merchants National Bank, 32 Ark. 346, in which it was said:

"True there is evidence that the accounts were stated monthly and a balance struck, but whether the usurious interest was or not paid is not shown; nor can we upon a fair consideration of the transactions between the parties admit *that* these monthly estimates to be separate and distinct settlements, or indeed settlements at all, but indeed to show how the accounts stood between the
95 parties. It was in fact a running account between the bank and its customers, Wormly, Joy & Co. commenced in 1866 and continued to 1868, the time when the account was closed by note, and in fact constituted but one transaction. * * * The usurious interest in this instance having been carried into the general account and made part of the sum found due upon final settlement taints the whole contract with usury, the fact that the account was closed by note amounts to nothing; it matters not whether the usury was charged and taken by any tacid assent of the firm by the bank in stating the monthly account or by note substituted for the one first given; the question is not how was the contract closed or renewed but whether any part of the sum charged and for which the note was executed was for the use or forbearance of money at a greater rate of interest than allowed by the law to be taken. Such is clearly the rule as laid down by the elementary writers and accords with numerous decisions to some of which we will refer."

A similar view was taken in National Bank *vs.* Lewis, 75 N. Y. 516, in which it was said:

"In the case at bar the entire line or series of notes discounted which are stated at length in the sixth defense constitute one connected continuous transaction; and under such circumstances the taint of usury affects the whole; and where the bank sues to recover on the last series or renewal notes the forfeiture of the entire interest follows as a necessary result, and credit must be given for all the interest which has been paid from beginning of the loan."

Plaintiff asserts that the note finally given by defendant to the bank constituted a written agreement to pay a higher rate of interest than six per cent., but even if this be true it did not purge the note of the usurious interest which had not been paid and which went to make up the sum for which the note was executed.

"The forfeiture declared by the statute is not waived or avoided by giving a separate note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must
96 if the forfeiture clause of the statute be relied on and the matter is thus brought to the attention of the court, lose the entire interest which the note bears or which has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest which the note, bill or other evidence of debt carries, or which was agreed to be paid, but which has not been actually paid." Brown *vs.* National Bank, *supra.*

Plaintiff further contends that there is a *locus penitentia* for it, and, that any time before entry of final judgment it may consider the excessive interest paid on account of the loan and so apply it and

lessen the principal. That up to that time it may make its election. In support of this contention plaintiff relies chiefly upon Duncan *vs.* First National Bank of Mount Pleasant, 1st Thompson National Bank Cases, 360; approved in McBrown *v.* Scottish Investment Co. 153 U. S. 328; Slevins *vs.* Lincoln, 7 Metcalf, 528; Wright *vs.* Laing, 3 B. & C. 169, and Saunders *v.* Lambert, 7 Gray, 456.

The case first cited was an action under the laws of New Mexico to recover double the amount alleged to have been collected and received by the defendant in excess of the legal rate of interest. The statutes of that Territory make void a contract of loan providing for usurious interest *only as to the interest in excess of what the statute allows*, while section 5198 of the national banking act expressly provides "that the taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be *deemed a forfeiture* of the interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon."

Duncan *vs.* First National Bank of Mt. Pleasant, *supra*, was an action under the national banking act to recover twice the amount of usurious interest paid upon loans from the bank, and it was held that where a national bank has taken usurious interest on a loan or discount it may elect to apply the excess of interest on the principal at any time before the loan is paid in full, or before the
97 judgment is entered for the full amount. But no allusion is made in that case to the provision of the national banking act above quoted, which declares that the taking of usurious interest *forfeits* the entire interest.

Stephens *vs.* Lincoln, 7 Metcalf 525, was also an action to recover back usurious interest and it was held that while the usurious interest is unpaid there remains the *locus penitentia*; that the party may relinquish it, and recover the balance of his debt, the *contract not being rendered void by the statute.*

To the same effect is Sanders *vs.* Lambert, 7 Gray, 476.

It is apparent from a casual reading of these adjudications that they have no bearing upon the case in hand, nor has any case or authority been called to our attention where any such rule is announced in an action by a national bank to recover upon a note executed to it containing usurious interest *where the forfeiture clause of the statute* was relied upon as a defense, and, the matter brought to the attention of the court. Any such ruling would be in the face of the express provisions of the statute, and thwart its very purposes. Would be an inducement to national banks to charge usurious interest, and when compelled to sue upon its paper containing usury, and that defense is pleaded, simply say to the debtor, we will credit the amount of the usurious interest paid by you on the principal of your debt, and thereby escape the penalty of the law, certainly no such consequences were intended by it.

Something has been said by counsel for plaintiff with respect to segregating what they admit to have been usurious transactions, from those not tain-ed with usury, but from our view of the case as

herein expressed the entire transaction or practically so, is tainted with usury.

Our conclusion is that the judgment should be reversed with direction to the trial court to enter up judgment for plaintiff upon the following basis:

December 29, 1893		$15,000.00
Principal of overdraft on July 12th, 1895		474.24
	Net credit on bank acc't on that day	230.50
98	Credit by note of October 1st, 1895	2,500.00
	Principal of overdraft April 29th, 1896	874.81
Credit on acc't that date		2.42
	Total amount loaned	$19,081.97
Credit by proceeds of col., Jan. 25th, 1898		5,5000.00

All concur.

G. D. BURGESS.

And afterwards to-wit, on the 20th day of March, 1903, the further following proceedings were had in said cause, viz:

CITIZENS NAT. BK., K. C., Resp.,
v.
M. S. C. DONNELL, App.

Now at this day, the court having fully considered and understood the motion heretofore filed for leave to file a motion for rehearing herein, doth order that said motion for leave to file be, and the same is sustained.

Which said motion for leave to file motion for rehearing is in words and figures as follows, to-wit:

In the Supreme Court of the State of Missouri. En Banc.

CITIZENS NATIONAL BANK OF KANSAS CITY, Respondent,
vs.
M. S. C. DONNELL, Appellant.

Motion for Leave to File Motion for Rehearing Out of Time.

Now comes the above named respondent and moves the court for leave to file its motion for rehearing of said cause, at this time, and for grounds of such motion states that on the 13th day of
99 March, 1903, it placed in the hands of Horn & Company, printers of Kansas City, Missouri, its motion for rehearing of the above cause, for the purpose of having the same printed and ten (10) copies thereof sent to the clerk of this court, as required by the rules of the court; that the attorneys for this respondent in placing said motion in the hands of said printers instructed the said

Horn & Company to send the same on said 13th day of March, 1903, by express to John R. Green, Esq., the clerk of this court that said motion was duly printed by the said Horn & Company and on the evening of the said 13th day of March, 1903, the manager of said printing company directed one of its employees to send eleven printed copies of said motion for rehearing to the clerk of this court, addressed to him at Jefferson City; that said employee of said printing company by mistake or inadvertence delivered said package containing said eleven printed copies of said motion for rehearing to the American Express Company at Kansas City, Missouri, for transmission to the clerk of this court instead of to the Pacific Express Company as was intended; that by reason of said mistake or inadvertence of said employee of said printing company said motions for rehearing were not carried directly to Jefferson City but by some round-about way, by reason of which they did not reach the clerk of this court until the 16th day of March, 1903, two days later than they would have reached him had they been sent by the Pacific Express Company, as was intended.

The affidavit of Frank H. Horn, the manager of said printing company, showing said facts, is hereto attached.

Wherefore this respondent asks leave of court to file said ten printed copies of said motion for a rehearing with the clerk of this court and that the same may be taken and considered by this court as if they had been filed within ten days from the 4th day of March, 1903, the date when the opinion of the court was filed in this cause.

WARNER, DEAN, McLEOD & HOLDEN,
Attorneys for Respondent.

100 In the Supreme Court of Missouri. En Banc.

CITIZENS NATIONAL BANK OF KANSAS CITY, Respondent,
vs.
M. S. C. DONNELL, Appellant. } No. 9635.

STATE OF MISSOURI, *County of Jackson,* } *ss:*

Frank H. Horn, of lawful age, being duly sworn on oath states that he is the manager of the printing establishment of Horn & Company in Kansas City, Missouri, and on the 13th of March, 1903, said Horn & Company printed for Warner, Dean, McLeod & Holden, attorneys for the respondent in the above cause, a motion for rehearing; that said motion was printed in time to have sent the same by Pacific express over the Missouri Pacific railway from Kansas City to Jefferson City so that it would reach the clerk of the above court at Jefferson City on the morning of Saturday the 14th day of March, 1903; that an employee of the said Horn & Company, to whom eleven copies of said printed motion for rehearing were given for delivery to the express company, by mistake and inadvertence

took said printed copies of said motion to the American Express Company for transmission to John R. Green, Esq., the clerk of said court at Jefferson City and by reason of the mistake of said employé in delivering said printed motions to said American Express Company said motions were delayed in their transmission to Jefferson City, and did not reach the clerk's office there until Monday the 16th day of March, 1903.

This affiant further states that the mistake in delivering said printed copies of said motion to said American Express Company was induced by said express company informing said employee of said Horn & Company that it conveyed express matter directly to Jefferson City.

This affiant further states that if said printed motion had been delivered to said Pacific Express Company, as intended, they would have reached Jefferson City and been on file in the office of
101 said clerk of said court on the morning of the 14th of March, 1903.

FRANK H. HORN.

Subscribed and sworn to before me this 17th day of March, 1903. My commission expires March 31st, 1906.

[SEAL.] OLIVER C. MOSMAN,
Notary Public, Jackson County, Missouri.

And which said motion for rehearing is in words and figures as follows, to-wit:

In the Supreme Court of Missouri. En Banc.

THE CITIZENS NATIONAL BANK OF KANSAS CITY, Missouri, Respondent,
vs.
M. S. C. DONNELL, Appellant. } No. 9635.

Motion for Rehearing.

We respectfully request a rehearing in the above case for the following reasons:

The court in its opinion have manifestly erred as to several matters which have resulted not only greatly to the prejudice of the plaintiff in this case but are of primary importance to the commercial interests of the State. Statements are made in the opinion which are wholly at variance with the law as understood heretofore in this State and against the general principles of commercial law throughout the country.

(*a.*) The opinion of the court, we respectfully submit, is
102 wholly erroneous in its definition of what is and what is not compound interest and cannot be sustained by principle or authority.

(*b.*) It also erred in its declaration that if a note is compounded oftener than once a year it becomes usurious, even though such note may draw only four or five per cent. This is not only a perversion of the meaning of our statute, but against every decided case on the subject. It is only when the debtor is compelled to pay more than eight per cent. in the aggregate by compounding oftener than once a year that the transaction becomes usurious. This is, and has been for years the understanding and practice of banks, banking institutions, private individuals and municipal and other corporations and to-day it is safe to say there are millions of bonds and notes outstanding which draw five, six and seven per cent. interest, which provide specifically that interest shall be compounded every six months and in some cases where the rate of interest is four per cent. or five per cent., there is a provision that the same be compounded quarterly, and yet by the conclusions of the court in this case every one of such obligations becomes usurious.

(*c.*) This court in its opinion also makes the startling statement, that if a party does not pay his interest when due, and he is not, as he can be, forthwith sued for the defaulted interest, and interest on interest collected at the rate of six per cent. per annum, that if he should afterwards orally agree to pay seven per cent. for such forbearance and this agreement should be incorporated in writing by giving a new note for the principal and defaulted interest, that such a transaction is usurious.

Such a conclusion we most earnestly submit is without reason and without authority and can have no justification whatever.

(*d.*) The court completely overlooked the facts and conclusions of law in Brown *vs.* Marion National Bank, 169 U. S., 416–419, as to the doctrine of *locus penitentiæ* and erred in its conclusions respecting the same.

I.

The facts of the case, briefly and accurately stated are these:

Donnel induced the plaintiff bank to carry an indebtedness which bore interest at the rate of seven per cent. per annum, payable semi-annually. He soon defaulted with the bank as he had defaulted with his previous debtor in the payment of principal and interest. This occurred during the years of general financial depression, 1893, 1894, 1895 and following when the prevailing rates of interest were much higher than that charged in this case.

After three installments of interest on the above note had become over due, he agreed with the bank to pay interest on the de-
103 faulted payment at the rate of seven per cent. per annum.

This agreement was reduced to writing by executing a new note for the principal sum, the unpaid installments of interest and interest thereon at the rate of seven per cent.

It is said this transaction is usurious because it resulted in the party paying seven per cent. interest twice a year and interest on his defaulted interest at the same rate. It is not pretended anywhere that the payment of interest equalled eight per cent. so far as

this indebtedness is concerned. The calculations of interest conclusively show this.

From this reasoning of the court it follows that if a party or municipality or a private corporation executes a note which bears five per cent. interest and it is provided in the note or the mortgage or in the coupons attached to the note that if the installments of interest are not paid, they shall draw interest at five per cent. per annum that the party loaning the money is a usurer and that the party who has made the loan can escape paying interest and the more he litigates the matter the more he can swindle the individual or the institution from which he has borrowed his money. If this be the law in Missouri, then thousands of loans made by the banks, insurance companies, saving institutions, municipalities, such as towns, cities, school districts and others which bear five and six per cent. per annum, payable semi-annually with coupons which bear the same rate, are each and all usurious and this whole State is filled with a gang of usurers which deserves the criticism and condemnation which are indirectly put upon the plaintiff in this case in the opinion of this court.

Banks, savings institutions and trust companies are created by law not merely for commercial purposes, but to enable the people to get interest on their savings and these savings are loaned out by these institutions to the merchants, manufacturers or private individuals. For such institutions to pay interest appears to be highly commendable, but to charge interest in order to enable them to pay it again to their depositors seems now, in the language of the opinion, to be something very much in the nature of a crime.

II.

The statute provides that where no agreement is made a debt shall draw six per cent. interest but a written agreement may be made by which eight per cent. may be contracted for. It was once ten per cent.

Then follows section 3708, which specifies that no person shall directly or indirectly take for the loan of money or other commodity
above the rates of interest so specified.

104 This section is completely ignored by the court. It authorizes the conclusion which has become a part of the commercial practice of the State that a lender may always collect interest which aggregates eight per cent. on his money, but he cannot by compounding it oftener than once a year collect a greater rate of interest than that which will exceed in the aggregate eight per cent. every twelve months.

If this were not a correct conclusion, it would be difficult to discover what office section 3708 is to perform.

There is nothing in the statute or elsewhere which prohibits the payment of interest semi-annually or quarterly, and there is nothing unlawful in making an agreement to do it.

It is a necessary deduction, from the language of section 3708 that

a party may charge according "to those rates or proportions for the loan of any money or other commodity," and this we have stated is and has been the construction put upon the law of this State for many years.

In Brown *vs.* Crow, 29 S. W., 653, it is stated:

"The mere compounding of interest is not of itself usurious. Mills *vs.* Johnson, 23 Tex., 330; Andrews *vs.* Hoxie, 5 Tex., 194; Miner *vs.* Bank, 53 Tex., 561; Martin *vs.* Bank, 5 Tex. Civ. App., 171, 23 S. W., 1032. But if interest be provided for which exceeds the highest rate allowed by statute, it will be usurious, by whatever mode it is to be computed. If, by compounding, the limit prescribed by law is not exceeded, there is no violation of law, but if by compounding the limit is exceeded, it is a violation of the law. Watson *vs.* Mims., 56 Texas, 451."

This principle of law of universal acceptance has been wholly ignored by the opinion announced by the court in this case.

III.

The court in its opinion says:

"The law of Missouri did not permit the compounding of the interest on the Mason note oftener than once a year. Therefore when the bank compounded the interest on the Mason note oftener than once a year, it did that which it was not allowed to do by the laws of Missouri and in so doing violated the national banking act and subjected itself to the penalties therein provided."

Our contention is that the law does authorize the compounding of the interest on the Mason note oftener than once a year, provided eight per cent. was not exceeded by so doing.

And again, the opinion of the court says:

"There was no written agreement that interest upon interest or upon overdrafts was to bear any rate of interest at all, hence no higher rate than six per cent. could have been charged and anything in excess of that was usurious under section 3706."

105 We have already shown that the parties reduced their agreement to writing when the notes were executed and the notes themselves were necessarily the evidence of their agreement. What else could be demanded? According to the finding of the referee this agreement, which was at first verbal, was made at or about the time the notes were executed. The note and agreement is based solely upon considerations of past forbearance and for that reason, under the decision in Daniels *vs.* Wilson, 21 Minn., 530, even if it had been for more than eight per cent., it was not within the meaning of the statute. This decision was wholly overlooked in the opinion of the court. See our reference to it in our additional authorities for respondent on page 8.

But there is another side to this question and that is the conclusion of the court in the opinion that an oral agreement to pay more than six per cent. make the transaction usurious. If a grocer should agree to credit a customer six months in consideration of

his paying eight per cent. and this agreement is oral, our understanding of the law is that he could only collect six per cent. and the reason of it is manifest enough that but for the statute requiring the stipulation to be in writing, he could collect eight per cent. Hence the transaction is not usurious but the party by his failure to put the agreement in writing simply loses the difference between six per cent. and eight per cent. He is not condemned as a usurer for such failure but the amount of his recovery is, at most, reduced. This result we insist in according to reason and authority and we do not think it necessary to produce any authorities to substantiate a proposition so manifestly plain.

But the facts in this case are directly controlled by the case of The First National Bank *vs.* Fenn, decided by the supreme court of Iowa, and reported in the 39 S. W. Reporter, 239, and is entitled at least to the respectful consideration of this court.

The language of the court is as follows:

"Evidence was admitted, against the objection of the plaintiff, tending to show that he had orally agreed to give ten per cent. interest on the money she let him have. It is urged that the court erred in so overruling, because section 2077 of the Code provides that the rate of interest shall be six per cent. unless the parties, in writing, agree to pay above that rate. The statute does not, in terms, prohibit the parties from agreeing orally to pay ten per cent., and where this is done and the amount afterwards ascertained and an obligation in writing given therefor, we see no reason why such obligation cannot be enforced between the parties. The parol promise to pay was a sufficient consideration for the obligation. Clearly we think the defendant could not successfully plead that there was no consideration for the written promise."

Hence the court erred when it declared that an oral agreement to take more than six per cent. was unknown.

106 IV.

We now come to the small overdrafts on which interest was charged at the rate of twelve per cent. per annum. These were charged each month against the defendant but were not paid, but when the renewal notes were drawn up, it was agreed that these interest charges should stand and for the manifest reason that the interest on these small sums, added to the interest on the large sums loaned to the defendant by express contract did not, by pro rating the interest on the entire amount, exceed eight per cent.

If A should borrow from B, $5,000, on which he was to pay three per cent. and $150, on which the lender demanded ten per cent., but he had paid the interest on neither of the sums, and it was finally agreed between them that an obligation should be written in which the $5,000 and the $150 should be included and on the two amounts the interest should be so pro rated that it should be considerably less than three and one-half per cent. on the whole amount, will such an arrangement be condemned by the courts?

That was precisely the case here. There never was any agreement for interest on the overdrafts. The total interest when pro rated charged *were* only allowed because excessive interest was never charged. The aggregate of interest charged did not equal eight per cent. at any time.

We do not believe that conscience or any principles of law require that the court should go out of its way to help out a party who has tried to swindle his benefactor out of about nine thousand dollars of interest when it remembers that his benefactor protected him at a loss to itself during times of great financial trouble.

V.

But, even if it should be thought that the interest on the overdrafts must be condemned, we do not believe that the taint affects the rest of the indebtedness, simply because two loans, one usurious and one not usurious, were incorporated within a note. They are capable of seggregation and we have pointed out, on pages 6 and 7 of our brief, of "additional authorities for respondent," three authorities which sustain us in this statement.

VI.

We respectfully submit that the conclusion reached in the opinion of the court, with respect to the *locus penitentiæ* is not sustained by the Federal authorities.

In Duncan *vs.* First National Bank of Mount Pleasant, cited with approval by the supreme court of Iowa, in McBroom *vs.* Scottish Investment Company, 153 U. S., 328, it appears that loans had been made by a national bank and the interest charged was usurious. The plaintiff brought suit to recover back twice the amount of the usurious interest paid upon the loans and it was held that be-
107 fore the loan was paid in full or before the judgment was entered for the full amount, that the defendant might elect to apply the excess of interest on the principal.

It must be remembered that the national banking act provides that if usurious interest has been paid, the party can collect back twice the amount of the interest paid. If it is not paid, then the interest is forfeited. This court says in its opinion that there is a *locus penitentiæ* where the interest has been paid, but there is no *locus penitentiæ* where the interest has not been paid. We contend that this is not a correct deduction from the authorities.

The Supreme Court of the United States in Brown *vs.* Marion Nat'l Bank, 169 U. S., 416, 419, in express terms says:

"If the note, *when sued on*, includes usurious interest, or interest upon usurious interest agreed to be paid, the holder may, in due time, elect to remit such interest, and it can not then be said that usurious interest was paid to him."

In this case a suit was brought on notes in which usurious interest was charged to have entered, and the notes were given to a national bank.

This, we insist, is directly opposed to the conclusion reached in the opinion of this court.

We have already shown in McBroom *vs.* Scottish Mortgage and Land Investment Co., 153 U. S., 328, that our right to remit still exists, if there is usury in this case, which we deny; but, if the court still continues to so find, then we insist on our right to remit.

VII.

We insist that this court has put a definition on compound interest in construing the transactions relating to the notes in question that the decisions do not authorize. It is said that this is a case of compound interest because when the installments of interest became due they were not paid and the plaintiff charged interest on the past due installments. By doing this, it is said plaintiff was exacting compound interest. This is wholly incorrect according to the decisions. If a note is made payable in three years with interest every six months, at the rate of six per cent. per annum and the party does not pay the interest installments as they become due, he can be sued thereon and judgment will be recovered, not only for the installments of interest, but interest on such installments. Concerning this proposition there is no doubt. In the case at bar, instead of plaintiff bringing suit on the installments, the party
108 defendant agreed when the renewal notes were given, to pay interest on such installments and this is all there is to it. This was simply for past forbearance. The agreement was supported by a moral consideration. But according to the decision and Daniels *vs.* Wilson, 21 Minn., 530, if the agreement to pay interest on interest was wholly without other consideration, then neither the rights of the plaintiff or the defendant are prejudiced by it.

What constitutes a contract to compound interest is this and only this; that there shall be a stipulation in writing at the time the loan was made, that when the interest becomes due, if not paid, it shall draw interest at the rate the principal sum draws, and the same shall in effect, be added to the principal and become a part thereof.

The distinction between interest compounded periodically and simple interest on deferred installments of interest after payment should have been made, is wholly ignored by the opinion of this court.

The statute in the case prohibits compounding interest, but does not prohibit a party from collecting interest on deferred payments of interest. The word "compounding," used in the statute is manifestly used in a technical sense.

WARNER, DEAN, McLEOD & HOLDEN,
Attorneys for Respondent.

And afterwards, to-wit, on the 1st day of April, 1903, the following proceedings were had in said cause, viz:

CITIZENS NAT'L BK., K. C., Resp.,
v.
M. S. C. DONNELL, App.

Now at this day, the court having fully considered and understood the motion heretofore filed for rehearing herein, doth order that said motion be, and the same is hereby overruled.

And afterwards, to-wit, on the 23rd day of April, 1903, the further following proceedings were had in said cause, viz:

109 CITIZENS NATIONAL BANK OF KANSAS CITY, MISSOURI,
Respondent,
vs.
M. S. C. DONNELL, Appellant.

Now at this day, there is presented to the Honorable Waltour M. Robinson, chief justice of the supreme court of the State of Missouri, in chambers, a petition for a writ of error, a writ of error to the Supreme Court of the United States, a citation directed to said appellant, citing and admonishing him to appear at a Supreme Court of the United States on the 23rd day of May, 1903; an assignment of errors and a bond in the sum of twenty-five hundred ($2,500.00) dollars, which said writ of error is allowed, said citation signed, said assignment of errors filed and said bond approved, ordered filed and made a part of the record herein.

Which said petition for writ of error is in words and figures as follows, to wit:

In the Supreme Court of Missouri, April Term, 1903.

THE CITIZENS NATIONAL BANK OF KANSAS CITY, MISSOURI,
Respondent,
vs.
M. S. C. DONNELL, Appellant.

Petition for Writ of Error.

Now comes The Citizens National Bank of Kansas City, Missouri, respondent, and respectfully says that it feels aggrieved by the proceeding and judgment of this honorable court in the above entitled cause and that it believes this honorable court has committed the following errors in said cause, to wit:

1. Because the court erred in entertaining the defense of usury under the plea of the same in appellant's answer over the objection of respondent that said answer was insufficient to raise that defense.

2. Because by the opinion of the court the respondent is denied

the right to charge the rate of interest in the transaction of
110 its business conferred upon it by sections 5197 and 5198 of the national banking act and said opinion is in conflict with said provisions of that act.

3. That the court erred in finding that the respondent on July 12th, 1895, the date upon which the note for $17,500, mentioned in the petition was executed, charged or had charged compound interest at any time upon the Mason note so called, for $15,000 which conclusion is against the facts found by the referee and shown in the record of this cause.

4. Because even if the respondent may be said to have charged compound interest upon said Mason note the court erred in its conclusion of law that although the amount of interest so charged upon said note did not exceed eight per cent. per annum, yet that because compounded, the respondent was guilty of exacting and reserving usurious interest, entitling appellant under the national banking act to plead it as a bar to plaintiff's recovery of interest carried not only by said Mason note but also the subsequent notes mentioned in the record, including the note sued on herein.

5. Because even if the penalties so imposed upon appellant for overdrafts were usurious, yet the court erred in its conclusion of law in holding that although the total amount of interest charged by the respondent in each of the settlements with the appellant shown in the record, did not exceed in all the rate of eight per cent. per annum, the rate for which parties are allowed to contract by the laws of the State of Missouri, yet that because the penalties charged for the overdrafts exceeded that rate, the other independent items of indebtedness became infected with usury when united in renewals with said overdrafts and entitled the appellant to claim a forfeiture of all the interest on his entire indebtedness.

6. Because the court erred in its conclusion of law that because the laws of Missouri do not permit the compounding of interest oftener than once a year, the respondent had violated said
111 law in charging interest on the semi-annual instalments of interest on the Mason note referred to, on December 29th, 1894, June 29th, 1895, and July 12th, 1895, and it further holding that such charges of interest upon interest constituted usury and were a violation of the provisions of sections 5197 and 5198 of the national banking act relating to usury, entitling the appellant to claim the forfeiture imposed by said act.

7. Because the court erred in holding that there was no written agreement between the parties for the payment of interest upon interest, or upon overdrafts, and that therefore, no higher rate than six per cent. could have been charged and that anything in excess of that rate was usurious under section 3706 of the Revised Statutes of Missouri, 1899, and being usurious under said section was a violation of the provisions against usury in the national banking act.

8. Because the court erred in holding that even if a higher rate of interest than that allowed by the laws of Missouri had been charged upon the overdrafts, such excessive charges of interest com-

pelled the forfeiture of all interest upon the Mason note which the referee found had been agreed to be paid between appellant and the respondent and in refusing to enforce the Mason note aforesaid for the amount of the principal thereon together with interest according to its terms, and according to the agreement made between the parties aforesaid.

9. Because the court erred in holding that there was usury in the note for $2500 executed October 1st, 1895, upon the facts shown in the record and the admission of counsel for appellant in this court and in refusing to enforce said note with interest according to its terms.

10. Because the court erred in holding that because of the alleged usury in the overdrafts the other items of the appellant's indebtedness to the respondent, which in their inception contained no usury and which only became usurious, if at all, by contact with the overdrafts, thereby lost their interest bearing power.

11. Because the court erred in refusing to grant to the respondent a *locus penitentiæ* whereby it might, if it so elected, at any time
112 before the entry of final judgment consider all items of excessive interest as paid on account of the indebtedness and so apply it, and thereby lessen the principal.

12. Because the court erred in holding that the right to a *locus penitentiæ* only applies in an action brought by the debtor to recover double the amount alleged to have been unlawfully collected and received in excess of the legal rate of interest and does not apply in an action brought by the creditor upon the indebtedness against which the charge of usury is made by the debtor.

13. Because the court erred in reversing and remanding the case with directions to enter a specific judgment whereby an opportunity for a *locus penitentiæ* is cut off from the respondent, when, under the law, the respondent is entitled to this right and can only be accorded an opportunity for its exercise by a reversal of the case and remanding of the same for further proceedings in the lower court, under the opinion.

14. Because the court erred upon the admissions of appellant's counsel upon the hearing of this cause in division number 2 of this court as shown by his brief, that respondent was entitled to interest from the date of instituting this action in the lower court, in holding that the respondent was not entitled to interest for that period of time and in denying the respondent the right to such interest.

15. Because the court erred in reversing the finding and judgment of the circuit court of Jackson county, Missouri, in which said cause was tried, and from which it was appealed to this court, and remanding said cause with directions to enter the judgment set out in the opinion.

Wherefore, the premises considered, this respondent and petitioner says that it has been denied its rights accorded to it by the national banking act in the charging of interest in its business and prays that it may be awarded a writ of error by this honorable court issuing out of the Supreme Court of the United States, addressed to

this honorable court for the purpose of enabling said Supreme Court of the United States to examine and correct the errors as-
113 signed and for such other and further proceedings as to the said Supreme Court of the United States may seem proper.

WARNER, DEAN, McLEOD & HOLDEN,
Attorneys for The Citizens National Bank of Kansas City, Missouri, Respondent and Petitioner.

Which said assignment of errors is in words and figures as follows, to-wit:

In the Supreme Court of the United States, October Term, 1903.

THE CITIZENS NATIONAL BANK OF KANSAS CITY, MISSOURI, Plaintiff in Error,
vs.
M. S. C. DONNELL, Defendant in Error.

Assignment of Errors.

Now comes The Citizens National Bank of Kansas City, plaintiff in error by its counsel, and respectfully represents that it feels aggrieved by the proceedings and judgment of the supreme court of the State of Missouri in the above entitled cause and assigns error thereto as follows:

1. Because the said court erred in entertaining the defense of usury under the plea of the same in answer of defendant in error over the objection of the plaintiff in error that said answer was insufficient to raise that defense.

2. Because by the opinion of said supreme court of Missouri the plaintiff in error is denied the right to charge the rate of interest in the transaction of its business conferred upon it by sections 5197 and 5198 of the national banking act and said opinion is in conflict with said provisions of that act.

3. That the said court erred in finding that the plaintiff in error on July 12th, 1895, the date upon which the note for $17,500 men-
114 tioned in the petition was executed, charged or had charged compound interest at any time upon the Mason note so called, for $15,000 which conclusion is against the facts found by the referee as shown in the record of this cause.

4. Because even if the plaintiff in error may be said to have charged compound interest upon said Mason note the court erred in its conclusion of law that although the amount of interest so charged upon said note did not exceed eight per cent. per annum, yet that because compounded, the plaintiff in error was guilty of exacting and reserving usurious interest, entitling defendant in error under the national banking act to plead it as a bar to plaintiff's recovery of interest, carried not only by said Mason note, but

also the subsequent notes mentioned in the record including the note sued on herein.

5. Because even if the penalties imposed upon defendant in error for overdrafts, were usurious, yet the court erred in its conclusions of law in holding that although the total amount of interest charged by the plaintiff in error in each of the settlements with the defendant in error shown in the record, did not exceed in all the rate of eight per cent. per annum, the rate for which parties are allowed to contract by the laws of the State of Missouri, yet that because the penalties charged for the overdrafts exceeded that rate, the other independent items of indebtedness became infected with usury when united in renewals with said overdrafts and entitled the defendant in error to claim a forfeiture of all the interest on his entire indebtedness.

6. Because the court erred in its conclusion of law that because the laws of Missouri do not permit the compounding of interest oftener than once a year, the plaintiff in error had violated said law in charging interest on the semi-annual instalments of interest on the Mason note referred to, on December 29th, 1894, June 29th, 1895 and July 12th, 1895 and in further holding that such charges of interest upon interest constituted usury and were a violation of the provisions of sections 5197 and 5198 of the national banking act relating to usury, entitling the defendant in error to claim the forfeiture imposed by said act.

115 7. Because the court erred in holding that there was no written agreement between the parties for the payment of interest upon interest, or upon overdrafts, and that therefore, no higher rate than six per cent. could have been charged and that anything in excess of that rate was usurious under section 3706 of the Revised Statutes of Missouri, 1899, and being usurious under said section was a violation of the provisions against usury in the national banking act.

8. Because the court erred in holding that even if a higher rate of interest than that allowed by the laws of Missouri had been charged upon the overdrafts, such excessive charges of interest compelled the forfeiture of all interest upon the Mason note which the referee found had been agreed to be paid between defendant in error and the plaintiff in error and in refusing *the* enforce the Mason note aforesaid, for the amount of the principal thereon, together with interest according to its terms, and according to the agreement made between the parties aforesaid.

9. Because the court erred in holding that there was usury in the note for $2,500 executed October 1st, 1895, upon the facts shown in the record and the admissions of counsel for defendant in error in this court and in refusing to enforce said note with interest according to its terms.

10. Because the court erred in holding that because of the alleged usury in the overdrafts the other items of the indebtedness of the defendant in error to the plaintiff in error, which in their inception contained no usury and which only became usurious, if at all, by

contact with the overdrafts, thereby lost their interest bearing power.

11. Because the court erred in refusing to grant to the plaintiff in error a *locus penitentiæ* whereby it might, if it so elected, at any time before the entry of final judgment consider all items of excessive interest as paid on account of the indebtedness and so apply it and thereby lessen the principal.

12. Because the court erred in holding that the right to a *locus penitentiæ* only applies in an action brought by the debtor to recover double the amount alleged to have been unlawfully collected
116 and received in excess of the legal rate of interest and does not apply in an action brought by the creditor upon the indebtedness against which the charge of usury is made by the debtor.

13. Because the court erred in reversing and remanding the case with directions to enter a specific judgment whereby an opportunity for a *locus penitentiæ* is cut off from the plaintiff in error, when under the law, the plaintiff in error is entitled to this right and can only be accorded an opportunity for its exercise by a reversal of the case and remanding of the same for further proceedings in the lower court, under the opinion.

14. Because the court erred upon the admissions of defendant in error's counsel upon the hearing of this cause in division number 2 of this court as shown by his brief, that plaintiff in error was entitled to interest from the date of instsituting this action in the lower court, in holding that the plaintiff in error was not entitled to interest for that period of time and in denying the plaintiff in error the right to such interest.

15. Because the court erred in reversing the finding and judgment of the circuit court of Jackson county, Missouri, in which said cause was tried, and from which it was appealed to this court, and remanding said cause with directions to enter the judgment set out in the opinion.

Wherefore, plaintiff in error prays this honorable court to examine and correct the errors assigned and for a reversal of the judgment of the supreme court of the State of Missouri, entered in the above entitled cause with directions to said supreme court of Missouri to affirm the judgment rendered in said cause by the circuit court of Jackson county, Missouri, at Kansas City.

WARNER, DEAN, McLEOD & HOLDEN,
Attorneys for Plaintiff in Error.

Which said bond is in words and figures as follows, to-wit:

117 Know all men by these presents, that we, The Citizens National Bank of Kansas City, Missouri, as principal, and National Surety Company, a corporation organized under the laws of the State of New York, as surety are held and firmly bound unto M. S. C. Donnell, in the full and just sum of two thousand five hundred and 00/100 dollars, to be paid to the said M. S. C. Donnell,

his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this — day of April, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at the October term, 1902, of the supreme court of the State of Missouri, in a suit depending in said court, between The Citizens National Bank of Kansas City, Missouri, plaintiff and respondent, and M. S. C. Donnell, defendant and appellant, a judgment was rendered against the said The Citizens National Bank of Kansas City, Missouri, and the said The Citizens National Bank of Kansas City, Missouri, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said M. S. C. Donnell, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Citizens National Bank of Kansas City, Missouri, shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] THE CITIZENS NATIONAL BANK OF KANSAS CITY, MISSOURI,
By W. H. SEEGER, *Cashier.* [SEAL.]
NATIONAL SURETY COMPANY,
By CHAS. S. V. LEWIS, [SEAL.]
Resident Vice-President.

Attest: JAS. VAN BUREN, JR. [SEAL.]
Resident Ass't Secretary.

Sealed and delivered in presence of
HALE & HOLDEN.

Approved by—
W. M. ROBINSON,
Chief Justice and Judge of the Supreme Court of the State of Missouri.

118 STATE OF MISSOURI, *set:*

I, John R. Green, clerk of the supreme court of the State of Missouri, hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the above entitled cause, as fully as the same remain of record and on file in my office.

Seal of the Supreme Court of Missouri.

In testimony whereof, I hereunto set my hand and affix the seal of said court at office in the city of Jefferson, this 2nd day of May, 1903.

JNO. R. GREEN, *Clerk.*

Endorsed on cover: File No. 18,933. Missouri supreme court. Term No. 283. The Citizens National Bank of Kansas City, Missouri, plaintiff in error, *vs.* M. S. C. Donnell. Filed May 15, 1903. File No. 18,933.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

THE CITIZENS NATIONAL BANK OF KANSAS CITY, MISSOURI,
Plaintiff in Error,

vs.

M. S. C. DONNELL,
Defendant in Error.

No. 283.

STATEMENT, BRIEF AND ARGUMENT ON MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM JUDGMENT.

STATEMENT.

The question in this case is the construction of the Federal statute relating to the interest that may be collected by a national bank. The contention of the plaintiff in error is that the construction put upon it by the state court is wholly at variance with its true meaning and the decisions of this court.

The plaintiff in error, a national bank brought suit against Donnell, defendant in error in the state court on a certain note which he had executed in favor of that bank. The defense was usury. The replication contained a denial that there was any usury. The trial court after a very careful examination of the facts held that there was no usury either in fact or in law. When the case was appealed to the judge who examined the record and wrote the opinion, it was held that there was usury because on some small overdrafts penalties were exacted in excess of the highest legal rate, and when these ovedrafts were included in relatively a very large indebtedness that the taint in the overdrafts poisoned the entire indebtedness, although the excess of these penalties above the legal rates in the entire transaction only amounted to $45.72, and it was a conceded fact that when the consolidation of the overdrafts with the large indebtedness took place the highest legal rate permitted by the laws of the state of Missouri, which was 8 per cent, was not equaled.

It was further held that to stipulate to pay interest on defaulted semi-annual installments of interest at 7 per cent was usury because interest could not be compounded semi-annually, even though it is also a conceded fact that the highest rate permitted to national banks was not equaled.

It was further held that because it was agreed orally that interest should be paid on those defaulted

semi-annual installments of interest that such an agreement was usurious, although this agreement was carried out by executing a promissory note in writing, according to its exact terms.

It is also shown by the laws of the state of Missouri that the penalties imposed in this case could not have been imposed under the state law.

It was shown that the transaction referred to was made in perfect good faith and that there was no intention or purpose to charge usury and that the officers of the bank were not aware until the decision of the Appellate Court was announced that they had committed this offense. Before, however, the final opinion of the appellate judge for the court *en banc* was announced, the bank insisted in its brief and in argument that if there was usury under the Federal statute, then by virtue of the decisions respecting it, it had the right to remit the trifling excess and collect what was held to be the legal rate (printed pages, 88, 109 and 117). This was denied and the bank was penalized in the sum of several thousands of dollars.

The uncontradicted facts are briefly these:

Donnell, a tax title speculator, had borrowed $15,000 from one Mason, of Providence, R. I., which indebtedness was secured by a mortgage on real estate. By the terms of the note representing this indebtedness, he was to pay 7 per cent semi-annually, according to interest coupons attached of $525 each. This loan was

made for three years but had been long overdue, and on October the 14th, 1892, he owed the entire principal sum and interest to the amount of $801.69. The owner of the note insisted on payment, and Donnell made an arrangement with the bank to carry this debt for him temporarily. This was the beginning of many long and unfortunate transactions had by the bank with Donnell, so that up to this day the bank has not gotten its money back, although nearly twelve years have elapsed.

In addition to, the foregoing loan, Donnell was permitted in order to meet his taxes and some small general expenses to make small overdrafts. The rule of the bank was to charge its customers a penalty of one per cent a month on all overdrafts. Nearly three years after October 14th, 1892, that is to say on July 12, 1895, and after Donnell had defaulted to the bank on the three semi-annual installments of interest on the $15,000 loan at 7 per cent and had failed to meet his overdrafts, it was orally agreed that a new note should be given to the bank for the Mason indebtedness of $15,000, and the three overdue installments of interest of $525 each, and for the overdrafts amounting to $596.74. The actual money received on these overdrafts was $569.74. The interest charged in the shape of penalties was $27. The excess over 8 per cent was $9.00. In addition the foregoing $230.50 was placed to Donnell's credit.

Thereupon a new note was given for $17.500. The interest that entered into the new note was as follows and no more:

The interest on the $15,000 at 7 per cent. This was represented by the unpaid installments, interest on those defaulted installments at 7 per cent the penalties on the overdrafts which amounted to $27, which was $9.00 in excess of the highest legal rate of 8 per cent. The aggregate of interest exceeded 7 per cent computed straight, but a small fraction over 7 per cent. It was less than 7 1-2 per cent, and at no time exceeded the highest rate permitted by the National Banking Act for banks to receive (Printed Record, page 59, 60 and 61).

Afterwards the bank permitted Donnell to make some further overdrafts and a like penalty was exacted. The entire aggregate of the penalties exacted was $167.15. At 8 per cent they would amount to $111.43. The excess above the highest legal rate on all the overdrafts during the many years that Donnell did business with the bank, was $45.72 and no more, as we have stated.

Afterwards it became necessary because of defects and fraud in Donnell's mortgage security to loan him more money so that the aggregate of the amounts of the indebtedness of the bank against Donnell amounted to $22,000.

In the subsequent renewals and enlargements of the $17,500 note there was also incorporated a very smal penalty, on an overdraft, but as we have stated. the excessive penalties on all the overdrafts, exacted throughout, were $45.72.

The propositions of law involved in this case to state them with greater fullness, are as follows:

First: If a small debt, however trifling, in which there is usury charged if considered by itself, but is not collected, and it is consolidated with a large debt in which there is no usury, and the aggregate of the interest agreed upon is less than the legal rate allowed by the National Banking Act, then it is not usury. In other words insted of the less poisoning the whole, the greater purifies the less.

Second: Where there is usury in one debt and no usury in another and those two debts are consolidated, a separation between the valid and the invalid will be permitted.

Third: If there is no agreement to compound interest, and interest becomes due, and the party fails to pay as he should, and afterwards agrees to pay the same rate as he pays on the principal and gives a note in which this agreement is embodied, this is not compound interest.

Fourth: The National Banking Act does not forbid compound interest.

Fifth: If interest is compounded semi-annually by a national bank and the bank takes much less than the highest rate allowed by the National Banking Act, it is not usury. For illustration, if a note at 4 per cent is renewed every ninety days, it is not usury where the legal rate is 8 per cent.

Sixth: If the state law gives only 6 per cent on debts in which there is not a greater rate specified, in writing, but permits eight per cent to be contracted for in writing, a parol agreement to pay 7 per cent is not usurious because the state cannot prescribe for the general government the forms or methods in which its financial institutions may do business; and this is especially true where a national bank in pursuance of the oral agreement of its debtor to pay said interest, obtained from him a writing in the form of a note given in strict accordance with its terms. This was a writing.

Seventh: There can be no usury where a bank does not collect the highest rate of interest permitted to it by the law of its incorporation, which is the National Banking Act.

Eighth: There is a *locus penitentiae* allowed by the decisions of this court under the facts in this case, which the state court refused to recognize:

Ninth: The excessive interest paid on the overdrafts when considered in connection with the large debt with which the overdrafts were consolidated, was so trifling that neither law nor equity will regard it, even if it be held that they were not lawfully charged for past forbearance.

Tenth: The legal effect of the state law as construed by the state court is to discriminate between state institution and national banks because there is in substance practically no penalty for usury under the state law.

BRIEF AND ARGUMENT.

The questions involved in the pleadings and in the opinion of the court in this case are Sections 5197 and 5198, of that act. These sections of the National Banking Act are as follows:

Section 5197: Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the State, Territory or district where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state, or territory or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum and such interest may be taken in advance, reckoning the days from which the note, bill or other evidence of debt has to run. And the purchase, discount or sale of a *bona-fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

Section 5198: The taking, receiving, reserving or

charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom has been paid, or his legal representatives may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced withi ntwo years from the time the usurious transaction occurred."

By the laws of Missouri, if there is no written contract or other agreement as to interest the debt will draw six per cent. Parties may contract in writing for eight per cent. If the contract or debt calls for interest in excess of these rates, the excess, if paid, is applied to the principal debt and the debtor is compelled to pay the legal rate but escapes payment of costs. The section of the Missouri Statute (Revised Statutes 1899) which fixes this penalty is in the following words:

"*Sec.* 3709: *Usury may be pleaded as a defense in civil actions in the courts of this state, and upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount found due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage or as payment upon the principal, or as interest on said indebtedness.*"

The other sections of the Missouri Statute relating to the subject under discussion are as follows:

"Sec. 3705: Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest had been made".

Sec. 3706. *The parties may agree, in writing, for the payment of interest, not exceeding eight per cent. per annum, on money due or to become due upon any contract.*

Sec. 3707. Interest shall be allowed on all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction be made by payment, accord or sale of property; all such judgments and orders for money upon contracts bearing more than six per cent, interest shall bear the same interest borne by such contracts and all other judgments and orders for money shall bear six per cent. per annum until satisfaction made, as aforesaid.

Sec. 3708: No person shall directly or indirectly take, for the use of loan of money or other commodity, above the rates of interest specified in the three preceding sections, for the forbearance or use of one hundred dollars, or the value thereof, for one year, and so

after those rates for a greater or less sum, or for a longer or shorter time, or according to those rates or preportions, for the loan of any money or other commodity.

The judgment of the state court undertook to declare a forfeiture of the entire interest which amounts to about eleven thousand dollars, assuming to do this according to the provisions of the National Banking Act and not according to the provision of the state law. The consideration of that act and the right of the plaintiff in error to be penalized in this large sum under that act is the question, and the only question in this case. The pleadings of the defendant demand the forfeiture of the entire interest under the National Banking Act, because there could be no such forfeiture under the state law. The opinion of the court also is based upon its construction of those sections of the Banking Act which we have cited. (Printed Record page 97). The brief of counsel in the case presents the construction of those two sections of that act and the forfeiture authorized by it. (Printed Record, pages 82, 83, 84, 85, 87, 88, 89, 75 and 76).

Therefore it cannot be seriously claimed, that there is no federal question in the case.

Under the law a National Bank to assert its rights to enforce its claims or to do business as such must in the first instance bring action in the state court. It cannot sue in the Federal Court; the law was once otherwise. The fact that the bank is a national corporation the existence of which depends upon a Federal statute and its rights and obligations determined by that statute; that the transactions in question in the first place were had directly with such bank; that

the defense in the case is a forfeiture claimed under that act and no other; that the opinion of the court rests upon that statute and that the arguments in the brief of counsel for the bank rely on that statute as construed by this court, all show that this court could not do otherwise than take jurisdiction.

If usury has been rightfully found, then the extent of the forfeiture, and when it will be imposed and when it will not be imposed, are all Federal questions and not state. If the decisions of this court as we will abundantly show, will not authorize the penalizing of the bank as has been done in this case, then the action of the state court is in violation of such decisions and will be set aside.

Moreover if the foregoing were not necessarily so, the record makes this further showing:

The Supreme Court of Missouri under the constitution of that state, consists of seven judges and the court is divided into two divisions. One division consists of four judges and the other of three. All civil cases may be appealed or brought by writ of error to either division, but when the case involves a federal question, it may be transferred by the losing party to the court *en banc.* The provision of the constitution on this point is as follows:

"When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, *or when a federal question is involved,* the cause, on the application of the losing party, shall be transferred to the court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

Sec. 4, of the Amendment to the Constitution of the State of Missouri, adopted in 1890; See R. S., Mo., 1899, pages 94 and 95.

When a cause is transferred from the division which heard it to the court *en banc*, it is heard *de novo*. The reasons which were set out for the transference of the case from Division number 2, to the court *en banc*, are as follows:

"Inasmuch as the decision of this controversy requires an interpretation of sections, 5197 and 5198, of the national banking act, and the determination of a right claimed by respondent to be exercised under one of the laws of the United States in the transaction of respondent's business, a federal question is involved. It is a case which is reviewable by writ of error in the Supreme Court of the United States, under section 709, of the Revised Statutes of the United States for the same reason, and should therefore, receive the consideration of the full bench of this state.

Central Bank v. Haseltine, 155 Mo., 59.
Haseltine v. Central Bank, 155 Mo., 66.
Haseltine v. Central Bank, 183 U. S., 130.
Central Bank v. Haseltine, 183 U. S., 132."

(Printed Record, page 90.)

We will now proceed to notice in a general way some of the decisions on the subject of usury, its definition and the penalities imposed so far as they affect national banks as fiscal agencies of the government:

(a) *Definition of usury and its penalties are federal questions.*

In *Haseltine vs. Central Bank of Springfield,* 183 U. S., 134, This court, by Mr. Justice Brown, said:

"We understand it to be conceded that, as the note in question was given to a national bank, the definition of usury and the penalties affixed thereto must be determined by the national banking law and not by the law of the state.. Farmers & Mechanics' Bank vs. Dearing, 91 U. S., 29. In that case, it was held that a law of New York forfeiting the entire debt for usury was superseded by the national banking act, and that such law was only to be regarded in determining the penalty for usury."

The penalties prescribed by section 5198 of the national banking act, are exculsive, and the usury laws of the state have no application to national banks in so far as such penalties are concerned.

Farmers & Mechanics' Bank vs. Dearing 91 U. S., 29.

To subject a bank to the penalty for taking usurious interest there must have been not only a larger rate of interest than allowed by the state law, but the larger rate must have been knowingly received.

National Banking Act., Sec. 5198.

And this must not only be alleged, but proven,

Henderson vs. Albes, 15 S. W., 132

"Where a statute prescribes a rate of interest, and simply forbids the taking of more, and more is con-

tracted for, the contract is good for what might be lawfully taken, and void only as to the excess. *Burnhisel vs. Firman,* Assignee, 22 Wall, 170; *German vs. Calvert,* 12 Serg & R., 46; Forfeitures are not favored in the law. Courts always incline against them. *Marshall vs. Vicksburg,* 15 Wall., 156. When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred. Nattel, 20th Rule of Construction."

Farmers' & Mechanics' Nat'l Bank, vs. Dearing, 91 U. S., 35.

(b). *The national banking act authorizes the taking of the highest rate allowed by the laws of the state.*

The language of that act permits in express terms the taking of interest "at the rate allowed by the laws of the state." Manifestly the state cannot prescribe for the general government how that rate must be contracted for. Such a claim is preposterous.

(c) *This court will take jurisdiction of this case independent of the fact that the question involved is of itself a Federal question, not only because it was raised in the State Supreme Court in the motion to transfer the case to the court en banc but also because it was raised both in the brief of counsel for the bank and in the opinion of the court.*

In *Mallett v. North Carolina,* 181 U. S., 589-592, this court said:

"It is true, as we learn from the first opinion filed by the Supreme Court, that such federal questions were not considered by that court, or, at all events, were

not treated as federal questions, but as questions arising under state laws. But the record discloses that, after that opinion had been filed but before it had been certified down, the defendants filed a petition for reargument, and presented the federal questions on which they rely. The Supreme Court entertained the petition, and proceeded to discuss and decide the federal questions. In support of the motion to dismiss numerous decisions of this court are cited to the effect that it is too late to raise a federal question by a petition for a re-hearing in the Supreme Court of a state after that court has pronounced its final decision. *Loeber v. Schroeder*, 149 U. S., 580; *Sayward v. Denny*, 158 U. S., 180; *Pim v. St. Louis*, 165 U. S., 273. But those were cases in which the Supreme Court of the state refused the petition for a re-hearing, and dismissed the petition without passing upon the federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the federal questions raised in the petition, but disposed of them in an opinion found in this record. *State v. Mallett*, 125 N. C., 718. Had that court declined to pass upon the federal questions and dismissed the petition without considering them, we certainly would not undertake to revise their action."

In *Crowell v. Randall*, 10 Peters, 368, this court, through Mr. Justice Story also said:

"In the interpretation of this section of the act of 1789, it has been uniformly held, that to give this court appellate jurisdiction two things should have occurred and be apparent in the record: First, that some one of the questions stated in the section did arise in the court below; and secondly, that a decision was actually made thereon by the same court, in the manner re-

quired by the section. If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show that such a question might have occurred, or such a decision might have been made in the court below. It must be demonstrable that they did exist, and were made. The principal, perhaps the only important difficulty which has ever been felt by the court, has been in ascertaining in particular cases whether these matters (the question and decision) were apparent on the record. *And here the doctrine of the court has been that it is not indispensable that it should appear on the record, in totidem verbis, or by direct and positive statement, that the question was made and the decision given by the court below on the very point; but that it is sufficient, if it is clear, from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment.*" (The italics are ours).

In *Logan County National Bank v. Townsend*, 139 U. S., 67, it appeared that Townsend had sold to the bank certain bonds which the bank had agreed upon demand to replace to him at the same or a less price. Upon his subsequent demand the bank refused compliance, and thereupon Townsend brought his action in the state court against the bank to recover the difference between the amount paid for the bonds and their value at the time of the demand.

In the fifth paragraph of its answer, the bank pleaded the want of power on the part of its cashier to make the contract set out in the petition, and that the bank itself had no such power. The decision in the

state court was against this defense. A question of jurisdiction was raised in the Supreme Court of the United States, which was disposed of in the following language:

"Upon the question raised by the defendant in error as to the jurisdiction of this court, it is sufficient to say that the fifth paragraph of the answer, to which a demurrer was sustained, and one of the defendant's requests for instructions, which was refused, proceeded alike upon the ground that the bank was forbidden by the national banking act to make the contract or agreement set out in the petition, and, consequently, that it was exempted from liability to the plaintiff upon any ground whatever. The exemption or immunity thus specially set up in the court of original jurisdiction, and re-asserted in the Court of Appeals of Kentucky, having been denied by the judgment, the authority of this court to re-examine that judgment, so far as it determines that no such exemption or immunity as that claimed by the bank, under the act of congress, exists, is entirely clear. That the Court of Appeals of Kentucky may have held the bank liable independently of the question whether the act of congress forbade or did not forbid a national bank from making such a contract as the petition recites, does not show a want of jurisdiction in this court; for the defendant's contention was, and is, that consistently with the act of congress it cannot be held liable to the plaintiff upon any ground. *So that the judgment necessarily determined, adversely to the bank, that it had no such exemption or immunity as it asserts in virtue of the national banking act.*" (The italics are ours).

(d) *When an action is brought by a National Bank on a note executed in its favor and usury is pleaded,*

the court will permit such bank to remit the excessive interest stipulated for and recover the debt with legal interest. This is especially true when a transaction is in good faith and there was no intention to violate the law.

This court in *Brown vs. Marion National Bank*, 169 U. S., 416, 419, through Mr. Justice Harlan, said:

"If the note *when sued on* includes usurious interest or interest upon usurious interest, agreed to be paid, the holder may in due time, elect to remit such interest, and it cannot then be said that usurious interest was paid to him." (Italics ours).

Again in *McBroom v. Scottish Investment Co.*, 153 U. S., 318- 328, this court said:

"In *Duncan v. First Nat. Bank of Mount Pleasant*, in the District Court of the United States for the Western District of Pennsylvania, it was said: 'From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal, or up to the time of entering judgment, there is a *locus penitentiae* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it and lessen the principal. * * * Up to that time he may make this election. When payment is actually made or judgment entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete.' Thompson's National Bank Cases, 360, 362.

In *Stevens v. Lincoln,* 7 Met., 525, 528, which was an action, under a statute of Massachusetts, authorizing suit to recover threefold the amount of interest paid, it being alleged that interest had been paid at a greater rate than the law allowed, the court said: 'In regard to the payment of $1,458.91, whether this was a payment of the usurious interest or a part of it, we are of opinion, that while the usurious interest is unpaid, there remains the *locus penitentiae:* that the party may relinquish it, and recover for the balance of his debt—the contract not being rendered void by the statute. And in the absence of proof as to any appropriation of a partial payment, the law will apply a payment to the valid demand rather than to the illegal one: and the balance which remains unpaid, if it exceeds the usury agreed to be paid, includes the usury; so that, on one side, the debtor shall not recover back any part of that which he honestly owed, by the allegation, on his part, that the payment made by him was the payment of the usury; nor, on the other hand, will the law permit the creditor to secure to himself the avails of his illegal contract, and when he sues for the balance due on the contract, to aver that the usurious interest was contained in the previous payment, and that the residue is justly due.' The same rule was affirmed in *Saunders v. Lambert,* 7 Gray, 484, 486.

So in *Harvey v. National Life Ins. Co.,* 60 Vermont, 209, 211: 'As the result of that transaction the plaintiff went away with nine hundred dollars in money—all he had ever received from the defendant as his own money, and the defendant with the plaintiff's note for $1,000 * * * Hence the one hundred dollars usury entered into and became a part of the mortgage note. The payments made by the plaintiff and by Mrs. Hardaker prior to the time of taking up the note, would in law

be applied toward the payment of the legal portion of the note. * * * All the payments made by her, as well as those made by the plaintiff, up to the final payment, were in law to be applied towards the liquidation of the legal portion of the note. Hence the plaintiff is entitled to recover what was paid as the final payment of the note, above what was then legally due upon the note after applying the payments made thereon in liquidation of the legal portion of the note with interest.' To the same effect are the following authorities: *Kendall v. Crouch*, 88 Kentucky, 199, 202; *Smith v. Robinson*, 10 Allen, 130, 132; *Hawkins v. Welsh*, 8 Missouri, 490, 492; *Hall v. Fairfield Bank*, 30 Nebraska, 99, 102; *Jackson v. Garner*, 79 Georgia, 415."

"In *Wright v. Laing*, 3 B. & C., 165, 169, which was an action to recover the penalties of the statute of usury, Abbott, C. J., said: 'None of the payments were appropriated by either party at the times of payment. If the law ought now to make such an appropriation as the pleader has supposed in this count, the count will be sustained by the proof, otherwise not. We think the law ought now to make such an appropriation. And such an appropriation works no prejudice to the party; it leaves him only where by his own conduct he placed himself; and in the case I have put of the payment of one bill and the non-payment of the other, if an action for the penalties of the statute should be brought, the same principle of law would protect the defendant, by applying the payment of the first bill to the legal demand, and not permitting the then plaintiff to apply it to the illegal demand, that it is to the loan and interest, although it be precisely of the same amount; *because, peradventure, the lender might repent the illegal bargain and refuse to receive the full amount of the second bill, and the law will allow him the opportunity of doing so, that he might not be deemed a receiver of the*

usurious interest, without clear evidence that he had not only bargained to receive, but had actually received, such interest. And if the law will make this appropriation of the payment in the one instance against the lender, and to prevent him from enforcing an illegal bargain, and in the other instance in favor of the lender, and to protect him from being subject to a penalty for an illegal *bargain only*, it seems very plainly to follow that a similar appropriation ought to be made by law in the case before the court. * * And this, in effect, is only saying that where a person has two demands, one recognized by law, the other arising on a matter forbidden by law, and an unappropriated payment is made to him, the law will afterwards appropriate it to the demand which it acknowledges, and not to the demand which it prohibits.' " (Italics ours).

The foregoing right to remit the excessive interest and to charge all legal interest was expressly denied. It was claimed by the bank in its brief (printed record, page 88), also in its argument for re-hearing (page 117). It was overruled in the opinion of the court (page 109 of the printed record).

As soon as the state court found that there was usury, and the bank had been mistaken in its conclusions as to there being usury in the transaction, and before final judgment could be entered up in the case, in fact, before the case was heard before the court *en banc*, this right to remit the excessive interest was asked for and denied. But the appellate judge after such demand was made, ordered the judgment of the trial court to be reversed, and set aside, and judgment according to the opinion he announced, to be entered up in the trial court.

It will be remembered that it was denied that there was any usury in the replication of the bank to Donnell's answer. The referee in the trial court found that there was no usury on the facts (pages 59, 60, 61, 62, 63), and the judgment went for the bank in the trial court.

The record also shows that the bank acted in good faith throughout, not at any time taking even seven and one-half per cent on the entire transaction, although on the overdrafts, if considered separately, it did possibly take usurious interest. The overdrafts are as follows:

July 12, 1895, $596.74. Of this amount, $569.74 was the actual overdraft and the balance consisted of penalties of interest charged monthly on account thereof. That is to say, $27, one-third of which was excessive at 8 per cent. It should have charged $18. On April 29, the overdraft was $919.90. The actual overdraft was $876.36 and the balance consisted of the monthly charges; that is to say interest was $43.54. The rightful interest would have been $29.03.

Concerning these trifling sums the state judge should have said *de minimis lex non curatur.*

There was due on the original Mason note of $15,000 three semi-annual installments of interest of $525 each and interest on the overdue interest from the time it was due to the date of the note as well as said overdraft of $596.74 (printed record, page 60). Because Donnell had not paid his overdue interest on the $15,000 note for more than a year and a half, and it bore 7 per cent he was charged when the new note was given 7 per cent on the overdue installments of interest. This is also said to be usurious because the agreement was

not in writing. The agreement was in writing because it was put in writing when the note was given.

In other words, a note was given for $15,000, bearing seven per cent interest, payable semi-annually. Three installments of interest, for $525 were not paid, but a new note was given for the principal sum and unpaid installments of interest, and interest upon said unpaid installments at seven per cent, from the time they became due respectively. This is said to be usurious, notwithstanding the conceded fact that this bank did not get the highest rate allowed by the state by several dollars, and the reasons given by the learned judge in his opinion are two:

First: Because the contract was not in writing—when the very agreement to pay such interest on the notes was reduced to writing by the new note given.

Second: Because it was compounding interest semi-annually instead of annually, as against the statute.

(e) *The question of what is compound interest and what is not is necessarily to be determined by this court.*

The state law fixes the rate of interest, but in no other respect does it bear on the case. That rate in this instance is eight per cent per annum, and the state law inserts that rate into the National Baking Act, so far as this case is concerned, *but it does not insert any provision concerning the compounding of interest, nor does it make the National Banking Act say that parties shall not compound interest,* nor does it prescribe any penalty for compounding interest.

This is recognized in *Haseltine v. Bank,* 183 U. S., 132, because "the *definition of usury* and the penalties affixed thereto must be determined by the National Banking Act, and not by the law of the state."

It is a question of commercial law and it is determined by this court as a question of the law merchant generally, and it does not rest on the insufficient conclusion of any particular judge of any particular state court.

A national bank is allowed by law to take, reserve and receive the highest rate of interest allowed by the laws of the state. The banking act does not prescribe the form of the contract. It has the undoubted right to collect the highest rate of interest allowed by the state. It is claimed that because there was only a verbal agreement on the part of Donnell to pay interest on the unpaid installment of interest at the rate that the principal debt bore, that is to say seven per cent (which agreement was reduced to writing by the giving of a note for the unpaid interest) and interest on said unpaid interest and the principal debt at seven per cent that this was not such an agreement as was demanded by the statute of Missouri. Our contention was that the note itself was a writing, but the court did not so hold (printed record, page 103).

This conclusion is against all authority on this subject, as we will hereinafter show. But, be this as it may, since the National Banking Act gave to this bank the right of collecting the highest rate of interest allowed by the laws of the state, this right cannot be taken away by the legislature of any state, or any state judge.

Our further contention was that under the National Banking Act a parol agreement to pay less than the highest rate of interest could not be usurious.

The right to collect the highest rate of interest does not depend upon the formalities prescribed by the state, but upon the general principles of law to be declared by this court. If the state should enact a statute that no interest shall be collected by national banks on a debt at eight per cent or at a lower rate unless the agreement therefor is evidenced by a bond, witnessed and duly acknowledged and recorded as a deed, would such legislation be of any value as against one of the fiscal agencies of the general government? This illustration may be extreme, but in view of the decisions and legislation that have been attempted in the interests of state institutions and private bankers as against national banks, it may be worthy of consideration.

The methods of business to be pursued by a national bank cannot be prescribed by a state statute; they rest upon higher authority.

"When a statute fixes the rate of interest per annum, it has always been held that parties may lawfully contract for the payment of that rate, before the principal debt becomes due, at periods shorter than a year (*Meyer vs. The City of Muscatine*, 1 Wall., 384, 391.)"

Tyler on Usury, page 244.

Compound interest is not of itself usurious.

Mills vs. Johnson, 23 Texas, 329.
Weaver vs. Paris Exchange Bank, 33 Texas, 561.

Mills vs. Bales, 11 Conn., 455.
Lewis vs. Pound, 37 Conn., 218.
Turner vs. Miller, 1 Eng. (Ark.), 408.
Wilcox vs. Howland, 3 Park., 169.

"The mere compounding of interest is not of itself usurious. *Mills vs. Johnson*, 23 Tex., 339; *Andrews vs. Hozie*, 5 Tex., 194; *Miner vs. Bank*, 52 Tex., 363; *Martin vs. Bank*, 5 Tex. Civ. App., 171, 23 S. W., 1032. But if interest be provided for which exceeds the highest rate allowed by statute, it will be usurious, by whatever mode it is to be computed. If, by compounding, the limit prescribed by law is not exceeded, there is no violation of law, but if by compounding the limit is exceeded, it is a violation of the law. *Watson vs. Mines*, 56 Texas, 451. The form of the contract is immaterial. No device to evade the law will be upheld by the courts. *Mitchell vs. Napier*, 22 Tex., 121; *Cousins vs. Shipplewe*, 2 Willson, Civ. Cas. Ct. App., Section 802. The question is, does the contract or do the facts show an intention to pay or receive a greater interest than is allowed by law? In *Martin vs. Bank*, *supra*, in which it was decided that compounding interest was not of itself usurious, an examination of the facts will show that the principal debt only bore 10 per cent interest; that the coupons representing the accruing interest called for 12 per cent per annum interest; and a calculation will show that the interest on the debt and on the coupons, taken together, would be but a fraction over 11 per cent per annum, the law at the time allowing 12 per cent. Clearly there was no usury in the contract. The case of *Miner vs. Bank*, *supra*, decides that the renewal of a note in consideration of extension of time of payment, including both principal and interest, the new note bearing the highest rate of interest, would not be illegal upon the ground of usury."

Brown vs. Crow, 29 S. W. Rep., 653.

"The receiving of interest upon interest is not a violation of the statute of usury as no more than seven per cent is in such cases taken or received."

Stuart v. Petree, 55 N. Y., 621.

"Interest actually compounded and added to principal does not give the creditor more than seven per cent per annum for his money, and unless a rate of interest greater than that be taken, there is no usury. * * * Interest is justly and equitably due at the end of each year, if payable annually, and if the debtor, instead of paying it, gives his note or bond for it, there is no legal objection to enforcing its payment. * * If the interest is carried into an account current and the debtor gives his note for the balance of the account, it stands, in principle, upon the same footing."

Kellogg v. Hickok, 1 Wend., 521.

"A sum of money due for interest is as justly and fairly due as for any other consideration, and an agreement to pay interest upon it after it is due cannot be deemed usurious. Courts have been indisposed to compute interest upon interest where the contract between the parties was silent. But if, when the interest is due and payable, and constitutes a subsisting debt, the debtor asked to retain it and pay interest on the amount at the legal rate of interest, the agreement is not usurious. It is nothing more than an agreement to pay legal interest for the forbearance of enforcing the collection of the debt then actually due and demandable."

Fobes v. Cantfield, 3 Ohio 18.

"Computation of interest upon interest turned into principal does not increase the rate of interest upon the original loan and is not usury. When the payment of interest at stated periods form parts of the contract and upon the face of its payment at the times agreed upon, the payment of the principal is postponed to a distant day, interest may be recovered upon the interest from the time it falls due. After interest becomes due it may, by agreement, be turned into principal and bear interest."

Hale v. Hale, 1 Cadw. (Tenn.), 233.

"A promissory note given for the payment of interest upon interest, which had previously become due, is valid."

Wilcox v. Howland, 23 Pick., 167.

"The result of the doctrines upon this subject seems to be that a contract to pay compound interest is not usurious or void," Ib.

Stipulations to the effect that, if the debt be not paid at maturity, it shall draw interest thereafter at a rate greater than the statutory limit, are now generally regarded as penalties to induce prompt payment, and as the debtor has in it his power to avoid paying the penalty by discharging the debt when due, such agreements are held free from usury.

Upton vs. O'Donahue, (Neb. 1891), 49 N. W. Rep., 267.
Burke vs. Raab, 4 Ill. App., 338.

Lawrence vs. Cowles, 13 Ill., 577.
Downey vs. Beach, 78 Ill., 53.
Fisher vs. Otis, 3 Chand. (Wis.), 83.
Chaffee vs. Landers, 46 Ark., 364.
Jones vs. Hubbard, 5 Call (Va.), 211.
Call vs. Scott, 4 Call. (Va.), 402.
Pollard vs. Baylors, 6 Munf. (Va.), 433.

It is lawful to provide that if the debt be not paid at maturity, the debtor may pay the creditor's attorneys' fees for the collection of the debt.

Fowler vs. Equitable Trust Co., 141 U. S., 384.
Smith vs. Silvers, 32 Ind., 321.
Daniels vs. Silvers, 32 Ind., 322.
Nelson vs. Everett, 29 Iowa, 184.
Dunn vs. Rogers, 43 Ill., 260.

After congress gave to the national banks the absolute right to charge the highest rate of interest allowed by the various states in which they were established by its authority, it would be preposterous to say that it intended to allow each of the states and territories to define for congress what should be the penalties and what should not be, for usury, and what should be the definition of usury for those banks and what should not.

The National Banking Act does not pretend to do more than to allow the states to fix the rates of interest for the national banks under certain conditions. To have done more would have been clearly unwise and a harmonious administration of the law relating to the most valuable fiscal agencies that were ever instituted

in our government and without which our whole financial system would be incomplete, requires that the claim that the states or any of the courts of the states have authority to do more should be emphatically overruled. It would be a task of slight difficulty to contrive a system of legislation by a state or states unfriendly to these agencies of the general government by declaring everything usurious which is not usurious, according to the decisions of this court or of the law merchant and then fixing a punishment so trifling for the transactions which are so declared usurious that a national bank could not compete with a state bank, trust company or private individuals. This was not the intention of congress. To allow such a pretension would be most lamentable.

Therefore it is highly necessary that the general government should retain to itself the right to define what is usury and what is not. This right has not been surrendered and there is no reason why it should be and every good reason why it should not.

It is said that this transaction is usurious because it resulted in the party paying interest twice a year at the rate of seven per cent per annum, and interest on his defaulted interest at the same rate. It is not pretended anywhere that the payment of interest at any time equalled 8 per cent, so far as this indebtedness is concerned. The offense consists of this so-called compounding which was not compounding, according to any accepted definition of the term. The calculations of interest conclusively show that 8 per cent was never claimed.

From this reasoning of the court it follows that if

a private party or a municipality or a private corporation executes a note which bears four per cent interest semi-annually, and it is provided in the note or the mortgage or in the coupons attached to the note that if the installments of interest are not paid, they shall draw interest at five per cent per annum that the party loaning the money is a usurer and that the party who has made the loan can escape paying interest and the more he litigates the matter the more he can swindle the individual or the institution from which he has borrowed his money. If this be the law in Missouri, then thousands of loans made by the banks, insurance companies, saving institutions, municipalities, such as towns, cities, school districts and others which bear four and five per cent per annum, payable semi-annually with coupons which bear the same rate, are each and all usurious and this whole state is filled with a gang of usurers which deserves the criticism and condemnation which are indirectly put upon the plaintiff in this case in the opinion of this court.

Banks, savings institutions and trust companies are created by law not merely for commercial purposes, but to enable the people to get interest on their savings and the savings are loaned out by these institutions to the merchants, manufacturers or private individuals. For such institutions to pay interest appears to be highly commendable but to charge interest in order to enable them to pay it again to their depositors seems now, in the language of the opinion, to be something very much in the nature of a crime.

The state of Missouri may be compelled to submit to such a conclusion at least until it is again consider-

ed either judicially or legislatively, so far as its own institutions are concerned, but surely this is not required of the national banks.

The inquiry suggests itself even though the punishment of the usurer is slight under the state law, how can any state court "make the punishment fit the crime" when the rate of interest is five per cent, and there is no excess to be credited on the debt? The only benefit the usurer could possibly obtain by making such a plea would be that he might escape paying the costs.

In the meantime national banks forfeit their entire interest if not paid and double the interest if paid. Is such a discrimination permissible?

(f) *A parol agreement to pay interest upon interest is valid.*

Thayer v. Star Mining Co., 105 Ill., 541, 553.
Fessenden v. Taft, (N. H.) 17 Atl. Rep., 713, 714.
Cameron v. Bank, 37 Mich., 242, 244.
Brown v. Cass County Bank, (Iowa), 53 N. W. Rep., 410, 413.
Gill v. First National Bank, (S. D.), 57 N. W. Rep., 503.
First National Bank v. Fenn, (Iowa), 39 N. W., 279.

In the case of *First National Bank v. Fenn, supra*, the Supreme Court of Iowa said:

"Evidence was admitted, against the objection of the plaintiff, tending to show that he had orally agreed

to give his wife ten per cent interest on the money she let him have. It is urged that the court erred in so ruling because Section 2077 of the code provides that the rate of interest shall be six per cent unless the parties in writing agree to pay above that rate. The statute does not, in terms, prohibit the parties from agreeing orally to pay ten per cent, and where this is done and the amount afterwards ascertained and an obligation in writing given therefor, we see no reason why such obligation cannot be enforced between the parties. The parol promise to pay was a sufficient consideration for the obligation. Clearly we think the defendant could not successfully plead that there was no consideration for the written promise."

(g) *Where one debt is tainted with usury and the others are not, and all the debts are incorporated into one obligation, the tainted debt does not poison the whole.*

Even if the transactions respecting the overdrafts should be thought usurious and are not purged by the subsequent arrangement when the notes were given, and the interest on the entire indebtedness was made less than eight per cent, it can only effect the overdrafts themselves and not the principal part of the indebtedness.

"The mere fact that a note which, at the time of obtaining a new loan, was incorporated in a new note given for both debts, was tainted with usury, will not taint the new loan with usury."

Porter vs. Jeffries, (S. Car., 1894), 18 S. E. Rep., 229.

Where a note is made up in part of a pre-existing debt, and in part of usurious interest on another account, the note is not void, but the maker is entitled to an abatement thereof to the extent of the usury.

Smith vs. Heath, 4 Daly (N. Y.), 123.

In *Farmers & Mechanics Bank v. Hoagland,* 7 Fed., 159, the action was upon two notes, one for $3,618, and the other for $3,740.50. Each of these notes was the last renewal of a preceding series, the originals of which were each for $3,000, some five years prior in time. Each note had been renewed nineteen times and the usurious interest charged at the several renewals sometimes was paid, sometimes was included in whole or in part as new principal in the new renewal notes. The bank brought action upon these last notes and the question was raised whether it could recover any interest at all. It reads:

"The authorities therefore are decisive against the right of the plaintiff to recover any interest whatever upon the usurious transactions. It is to be added, however, that *one of the notes in suit includes an item of indebtedness of* $102 *growing out of an independent matter.*

Upon the demurrer and under the stipulation of the parties, let final judgment be entered for the plaintiff, the judgment to include, first, the face amount of the original notes, to-wit, $3,000, without interest; and *second, the sum of* $102, *with interest on the latter sum to be computed by the clerk."*

This extract from this opinion we think properly interprets the spirit and intention of the National Banking Act, and that is that there shall be no interest

upon any debt tainted with usury, but there shall be interest upon such portions of the indebtedness as are not usurious and which may be separated. In that case, $102 had been included in one of these renewals. It was not apparent from the renewal note itself, but only became so after the court had opened the entire transaction back through the nineteen renewals of the original debts, and it then became apparent that somewhere along the line of these renewals, an innocent and unobjectionable debt had been consolidated with an usurious one, but for that reason, interest was not lost upon the unobjectionable debt. So here we urge that applying the same principle, when this $20,000 note is set aside, and when the $17,500 note is likewise set aside, and it appears that there is left the Mason indebtedness of $15,000 free from all objection of usury in itself, but coupled in these later notes with an objectionable and usurious other debt, that the only logical conclusion for the court to come to is that having the right to so inspect the ultimate facts of these debts it must separate the good from the bad, punish the plaintiff for that portion wherein it has transgressed the law, but not punish it for matters where there has been no transgression. In other words, there should be an accounting taken to ascertain the amount of the Mason indebtedness with interest to date, and judgment for that amount should be awarded to this plaintiff. So also with the note for $2,500.

There are numerous authorities which bear out this interpretation of the act. Thus in *Burnhisel v. Firman*, 22 Wallace, 170, Mr. Justice Swayne said:

"It is a rule in equity that an incumbrance shall be kept alive or considered extinguished as shall most advance the justice of the case.

The application of this principle occurs most frequently in cases of usury. It is well settled that if a security founded upon a prior one be fatally tainted with that vice, and the prior one were free from it but given up and cancelled, and the latter one thereafter be adjudged void, the prior one will be revived, and may be enforced as if the latter one had not been given. The cases to this effect are very numerous. A vendor's lien may be revived under the same circumstances. *In the same suit, where there is a failure to recover upon the void security, the valid one, on account of which it was given, may be enforced.*"

In *Farmers' Bank v. Joslyn*, 37 N. Y., 353, it was said:

"The infected contract did not absolve the mortgagor from his antecedent obligations, nor did it impair the rights of the plaintiff under a prior and valid agreement. It is true that the usurer is not permitted, at his own election, to allege his illegal act, as a ground for re-instating an old security; *but it is equally true that a party, who claims to be the victim of exaction, cannot avail himself of the invalidity of a later contract, as a shield from liability on one of earlier date, which was honest and free from vice.* (*Brown v Dewey*, 1 Sandf. Ch., 57; *Swartout vs. Payne*, 19 Johns, 294; *Billintgon vs. Wagner*, 33 N. Y., 31; *La Farge v. Harter*, 5 Seld., 241; *Crane v. Hubbel*, 7 Paige, 413.)"

(h) *Usury cannot be imputed in a transaction before it has arisen.*

The learned judge who wrote the opinion in this case, in his stern zeal to punish this national bank as a usurer when no such or similar punishment could be inflicted upon a state institution, went even so far as to eliminate all interest on the $15,000 note which was earned before any usury attached, according to his own opinion. There were three installments of interest due on that note of $525 each. He refused to allow this interest to be collected because this interest was incorporated in the new note and interest upon interest at 7 per cent was agreed to be paid, orally and by the note itself, and the overdrafts in which the aggregate of the excessive interest did not exceed $45.72 therefore the whole transaction became so offensive to him that it was held that the bank must obtain no interest, and thus for almost twelve years the bank which is expected and required to pay interest to its depositors, has been deprived of interest on this indebtedness.

This clearly can not be correct. The offense, if there were any offense, can not go backward as well as forward. By the law of Missouri, if usury is once paid it cannot be collected back.

Ferguson v. Boden et al., 111 Mo., 208.
Ransom v. Hayes, 39 Mo., 445.

(i) *Charging interest on overdue interest is not compounding the interest.*

A very good explanation of the difference between compound interest and interest upon interest is found in Vol. 16 Am. & Eng. Enc. of Law (2 Ed.), page 1074. It is as follows:

"For the purpose if anything approaching a clear comprehension of this very difficult subject, it will be necessary to observe at the outset, a distinction, rarely made plain by the cases, between interest compounded periodically and simple interest on deferred installments of interest after payments should have been made. All interest on interest is frequently designated compound interest, but interest compounded annually or periodically involves a different method of computation and a different result from mere simple interest on annual or periodic interest. By the former method interest on interest, and so on *ad infinitum*, will bear interest, while in the latter case it is only the interest on the original principal sum upon which interest is given."

The compounding of interest, no matter how often, does not necessarily render the transaction usurious. It is not taking, receiving or charging a greater rate of interest than is allowed by the laws of the state, if, in fact, the amount of interest charged does not exceed the rate permitted by the laws of the state.

"Compound interest has nothing to do with the question of usury."

Kellogg vs. Hickok, 1 Wend., 521.

It is for this court to define what is or what is not compound interest. Even if compound interest had been charged, it is not prohibited by the National Banking Act.

For the foregoing reasons the motion to dismiss for want of jurisdiction and the motion to affirm the judgment should both be overruled and this case should be set down for hearing, according to the rules and practice of this court.

Respectfully submitted.

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Attorneys and Counsel for Plaintiff in Error.

FILED OCT. 1.

OCT 29 1906

SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

No. 36.

THE CITIZENS' NATIONAL BANK OF KANSAS CITY, MISSOURI, Plaintiff in Error,

vs.

M. S. C. BOUDELL, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF, AND ARGUMENT ON MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM JUDGMENT AND ON THE MERITS

Clarence H. Dean,
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Byron S. Adams, Printer, Washington, D. C. 1906

(18,933.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 36.

THE CITIZENS' NATIONAL BANK OF KANSAS CITY, MISSOURI, PLAINTIFF IN ERROR,

vs.

M. S. C. DONNELL, DEFENDANT IN ERROR.

Statement, Brief, and Argument on Motion to Dismiss Writ of Error and to Affirm Judgment and on the Merits.

STATEMENT.

The question in this case is the construction of the Federal statute relating to the interest that may be collected by a national bank. The contention of the plaintiff in error is that the construction put upon it by the State court is wholly at variance with its true meaning and the decisions of this court.

The jurisdiction of this court is also challenged.

The plaintiff in error, a national bank, brought suit against Donnell, defendant in error, in the State court on a certain note for $20,000, which he had executed in favor of that bank. The defense was usury. The replication contained a d enial that there was any usury. The trial court,

after a very careful examination of the facts, held that there was no usury, either in fact or in law. When the case was appealed to the judge who examined the record and wrote the opinion, it was held that there was usury, because on some small overdrafts penalties were exacted in excess of the highest legal rate, and that when these overdrafts were included in relatively a very large indebtedness that the taint in the overdrafts poisoned the entire indebtedness, although the excess of these penalties above the legal rates in the entire transaction only amounted to $45.72, and it was a conceded fact that when the consolidation of the overdrafts with the large indebtedness took place the highest legal rate permitted by the laws of the State of Missouri, which was 8 per cent., was not equaled.

It was further held that to stipulate to pay interest on defaulted semi-annual installments of interest at 7 per cent. was usury because it was said, could not interest be compounded semi-annually, even though it is a conceded fact that the highest rate permitted to national banks was not equaled.

It was further held that because it was agreed orally that interest should be paid on those defaulted semi-annual installments of interest that such an agreement was usurious, although this agreement was carried out by executing a promissory note in writing, according to its exact terms.

It will be shown by the laws of the State of Missouri that the penalties imposed in this case could not have been imposed under the State law.

It was shown that the transaction referred to was made in perfect good faith and that there was no intention or purpose to charge usury, and that the officers of the bank were not aware until the decision of the State supreme court was announced that they had committed this offense.

Before the final opinion of the appellate judge for the court *en banc* was announced the bank insisted in its brief and in argument that if there was usury under the Federal

statute, then, by virtue of the decisions respecting it, it had the right to remit the excess and collect what was held to be the legal rate (Printed Record, 88, 109, and 117). This was denied and the bank was penalized in the sum of several thousands of dollars.

The uncontradicted facts are briefly these:

Donnell, a tax-title speculator, had borrowed $15,000 from one Mason, of Providence, R. I., which indebtedness was secured by a mortgage on real estate. By the terms of the note representing this indebtedness he was to pay 7 per cent. semi-annually, according to interest coupons attached of $525 each.

There was this provision in the original note or bond for $15,000:

"This note and these coupons are to draw 7 per cent. interest per annum after maturity and are secured by deed of trust of even date herewith on real estate.

"The time for the payment of this indebtedness may, at the option of the makers thereof, be extended for three years longer, from July 29, 1889, to July 29th, 1892, provided they give said payee or his assigns notice thereof in writing six months previous to July 29, 1889" (Printed Record, 27).

This loan was made for three years, but had been long overdue, and on October the 14th, 1892, he owed the entire principal sum and interest to the amount of $801.69. The owner of the note insisted on payment and Donnell made an arrangement with the bank to carry this debt for him temporarily. This was the beginning of many long and unfortunate transactions had by the bank with Donnell, so that up to this day the bank has not gotten its money back, although twelve years have elapsed.

In addition to the foregoing loan, Donnell was permitted, in order to meet his taxes and some small general expenses, to make small overdrafts. The rule of the bank was to charge its customers a penalty of 1 per cent. a month on all overdrafts. Nearly three years after October 14, 1892—

that is to say, on July 12, 1895—and after Donnell had defaulted to the bank on the three semi-annual installments of interest on the $15,000 loan at 7 per cent. and had failed to meet his overdrafts, it was orally agreed that a new note should be given to the bank for the Mason indebtedness of $15,000 and the three overdue installments of interest of $525 each, and for the overdrafts amounting to $596.74. The actual money received on these overdrafts was $569.74 The interest charged in the shape of penalties was $27. The excess over 8 per cent. was $9. In addition, the foregoing $230.50 was placed to Donnell's credit (Referee's Report, Printed Record, 61).

Thereupon a new note was given for $17,500. The interest that entered into the new note was as follows and no more:

The interest on the $15,000 was put at 7 per cent. This was represented by the unpaid installments, interest on those defaulted installments at 7 per cent., the penalties on the overdrafts, which amounted to $27, which was $9 in excess of the highest legal rate of 8 per cent. The aggregate of interest exceeded 7 per cent. computed straight, but a small fraction over 7 per cent. It was less than 7½ per cent., and at no time exceeded the highest rate permitted by the National Banking act for banks to receive (Printed Record, pages 59, 60, and 61).

Afterwards the bank permitted Donnell to make some further overdrafts, and a like penalty was exacted. The entire aggregate of the penalties exacted was $167.15. At 8 per cent. they would amount to $111.43. The excess above the highest legal rate on all the overdrafts during the many years that Donnell did business with the bank was $45.72 and no more, as we have stated (Referee's Report, Printed Record, 61).

Afterwards it became necessary, because of defects and fraud in Donnell's mortgage security, to loan him more

money, so that the aggregate of the amounts of the indebtedness of the bank against Donnell amounted to $22,000.

In the subsequent renewals and enlargements of the $17,500 note there was also incorporated a very small penalty on overdrafts.

The propositions of law involved in this case, in addition to the jurisdictional question, are:

First. "The definition of usury and the penalties affixed thereto must be determined by the national banking law and not by the law of the State." What the various States may define to be usury and what is not is not conclusive upon this court. The rate of interest to be charged may be fixed by the States. Beyond this they have no power. It cannot regulate the forms of contracts or methods of business by which such institutions shall be governed with respect to the charging of interest.

Second. There can be no usury where a bank does not collect the highest rate of interest permitted to it by the law of its incorporation, which is the National Banking act.

Third. The National Banking act does not forbid compound interest.

Fourth. If interest is compounded semi-annually by a national bank and the bank takes less than the highest rate allowed by the National Banking act, it is not usury. For illustration, if a note at 4 per cent. is renewed every ninety days, it is not usury where the legal rate is 8 per cent.

Fifth. If there is no agreement to compound interest, and interest becomes due, and the party fails to pay as he should, and afterwards agrees to pay the same rate as he pays on the principal, and gives a note in which this agreement is embodied, this is not compound interest.

Sixth. If the State law gives only 6 per cent. on debts with respect to which a greater rate is not specified in writing,

but permits 8 per cent. to be contracted for in writing, a parol agreement to pay 7 per cent. is not usurious because the State cannot prescribe for the General Government the forms of contract or methods by which its financial institutions may do business, and this is especially true where a national bank, in pursuance of the oral agreement of its debtor to pay said interest, obtained from him a writing in the form of a note given in strict accordance with its terms. This was a writing according to every principle of commercial law.

Seventh. If a small debt, however trifling, in which there is usury charged if considered by itself, but is not collected, and it is consolidated with a large debt in which there is no usury, and the aggregate of the interest agreed upon is less than the legal rate allowed by the National Banking act then there is no usury.

Eighth. Where there is usury in one debt and no usury in another and those two debts are consolidated, a separation between the valid and the invalid will be permitted.

Ninth. There is a *locus penitentiæ* allowed by the decisions of this court with respect to the penalties for excessive interest charged by national banks and recognized by this court, which the State court refused to recognize.

Tenth. The excessive interest paid on the overdrafts, when considered in connection with the large debt with which the overdrafts were consolidated, was so trifling that neither law nor equity will regard it, even if it be held that they were not lawfully charged for past forbearance or were simply penalties.

Eleventh. The legal effect of the State law as construed by the State court is to discriminate between State institution and national banks because there is in substance practically no penalty for usury under the State law.

BRIEF AND ARGUMENT.

The questions involved in the pleadings and in the opinion of the court in this case are sections 5197 and 5198 of that act. These sections of the National Banking act are as follows:

"SECTION 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the State, Territory or district where the bank is located, and no more, except where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, or Territory or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum and such interest may be taken in advance, reckoning the days from which the note, bill, or other evidence of debt has to run. And the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

"SECTION 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom has been paid, or his legal representatives may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

By the laws of Missouri, if there is no written contract or other agreement as to interest the debt will draw 6 per cent. Parties may contract in writing for 8 per cent. If the contract or debt calls for interest in excess of these rates, the excess, if paid, is applied to the principal debt and the debtor is compelled to pay the legal rate, but escapes payment of costs. The section of the Missouri statute (Revised Statutes, 1899) which fixes this penalty is in the following words:

"SEC. 3709. *Usury may be pleaded as a defense in civil actions in the courts of this State, and upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, and shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount found due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage or as payment upon the principal, or as interest on said indebtedness.*"

The other sections of the Missouri statute relating to the subject under discussion are as follows:

"SEC. 3705. Creditors shall be allowed to receive interest at the rate of six per cent. per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest had been made.

"SEC. 3706. *The parties may agree, in writing, for the payment of interest, not exceeding eight per cent. per annum, on money due or to become due upon any contract.*

"SEC. 3707. Interest shall be allowed on all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction be made by payment, accord or sale of property; all such judgments and orders for money upon contracts bearing more than six per cent.

interest shall bear the same interest borne by such contracts and all other judgments and orders for money shall bear six per cent. per annum until satisfaction made, as aforesaid.

"SEC. 3708. No person shall directly or indirectly take, for the use of loan of money or other commodity, above the rates of interest specified in the three preceding sections, for the forbearance or use of one hundred dollars, or the value thereof, for one year, and so after those rates for a greater or less sum, or for a longer or shorter time, or according to those rates or proportions, for the loan of any money or other commodity."

"SEC. 3711. Parties may contract, in writing, for the payment of interest on interest; but interest shall not be compounded oftener than once a year. Where a different rate of interest is not expressed interest upon interest shall be at the same rate as interest on the principal debt."

The Record on the Question of Jurisdiction.

The judgment of the State court undertook to declare a forfeiture of the entire interest, which amounts to many thousands of dollars, assuming to do this according to the provisions of the National Banking act and not according to the provision of the State law. The consideration of that act and the right of the plaintiff in error to be penalized in this large sum under that act is the question and the only question in this case. The pleadings of the defendant demand the forfeiture of the entire interest under the National Banking act because there could be no such forfeiture under the State law. The opinion of the court is based upon its construction of those sections of the banking act which we have cited (Printed Record, pages 97, 103, 104, 105, 106, 107, 109). The brief of counsel in the case presents the construction of those two sections of that act and the forfeiture authorized by it (Printed Record, pages 82, 83, 84, 85, 87, 88, 89, 75, and 76).

Therefore it cannot be seriously claimed that there is no Federal question in the case.

Under the law a national bank to assert its rights to enforce its claims or to do business as such must, in the first instance, bring action in the State court. It cannot sue in the Federal court as the law once was. The fact that the bank is a national corporation the existence of which depends upon a Federal statute and its rights and obligations are determined by that statute; that the transactions, in question, in the first place, were had directly with such bank; that the defense in the case is a forfeiture claimed under that act and no other; that the opinion of the court rests upon that act, and that the arguments in the brief of counsel for the bank rely on that act as construed by this court, all show that this court could not do otherwise than take jurisdiction.

If usury has been rightfully found, then the extent of the forfeiture, and when it will be imposed and when it will not be imposed, are all Federal questions and not State. If the decisions of this court, as we will abundantly show, will not authorize the penalizing of the bank as has been done in this case, then the action of the State court is in violation of such decisions and will be set aside.

Moreover, if the foregoing were not necessarily so the record makes this further showing:

The supreme court of Missouri, under the constitution of that State, consists of seven judges, and the court is divided into two divisions. One division consists of four judges and the other of three. All civil cases may be appealed or brought by writ of error to either division, but when the case involves a Federal question it may be transferred by the losing party to the court *en banc*. The provision of the constitution on this point is as follows:

"When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, *or when a Federal question is involved*, the cause, on the application of the losing party, shall be transferred to the court for its decision; or when a division

in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

Sec. 4 of the amendment to the constitution of the State of Missouri, adopted in 1890; see R. S. Mo. 1899, pages 94 and 95.

When a cause is transferred from the division which heard it to the court *en banc*, it is heard *de novo*. The reasons which were set out for the transference of the case from division number 2 to the court *en banc* are as follows:

"Inasmuch as the decision of this controversy requires an interpretation of sections 5197 and 5198 of the National Banking act, and the determination of a right claimed by respondent to be exercised under one of the laws of the United States in the transaction of respondent's business, a Federal question is involved. It is a case which is reviewable by writ of error in the Supreme Court of the United States, under section 709 of the Revised Statutes of the United States, for the same reason, and should therefore, receive the consideration of the full bench of this State.

" *Central Bank v. Haseltine*, 155 Mo., 58.
" *Haseltine v. Central Bank*, 155 Mo., 66.
" *Haseltine v. Central Bank*, 183 U. S. 130.
" *Central Bank v. Haseltine*, 183 U. S., 132."

(Printed Record, page 90.)

We will now proceed to notice in a general way some of the decisions on the subject of usury, its definition, and the penalties imposed so far as they affect national banks as fiscal agencies of the Government, discussing the jurisdictional question later on.

(a.) *Thus this court will take jurisdiction of this case independent of the fact that the question involved is of itself a Federal question, not only because it was raised in the State supreme court in the motion to transfer the case to the court en banc, but also because it was raised both in the brief of counsel for the bank and in the opinion of the court.*

In *Mallett vs. North Carolina*, 181 U. S., 589–592, this court said:

"It is true, as we learned from the first opinion filed in the supreme court, that such Federal questions were not considered by that court, or, at all events, were not treated as Federal questions, but as questions arising under State laws. But the record discloses that, after that opinion had been filed but before it had been certified down, the defendants filed a petition for reargument, and presented the Federal questions on which they rely. The supreme court entertained the petition and proceeded to discuss and decide the Federal questions. In support of the motion to dismiss numerous decisions of this court are cited to the effect that it is too late to raise a Federal question by a petition for a rehearing in the supreme court of a State after that court has pronounced its final decision. *Lasher v. Schroeder*, 149 U. S., 589; *Sayward v. Denny*, 158 U. S., 180; *Pim v. St. Louis*, 165 U. S., 273. But those were cases in which the supreme court of the State refused the petition for a rehearing, and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the supreme court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record. *State v. Mallett*, 125 N. C., 718. Had that court declined to pass upon the Federal questions and dismissed the petition without considering them, we certainly would not undertake to review their action."

In Missouri, Kansas, etc., Ry. Co. *vs.* Elliott, 184 U. S., 532, Mr. Justice White said:

"The general rule undoubtedly is that those Federal questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the State court intended to and did assert such a Federal right in the State court. But it is equally true that even although the allegations of Federal right made in the State court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a Federal nature was brought to the at-

tention of the State court, nor if the State court deciding the case has actually considered and determined a Federal question, although arising on undisputed averments, from a full and controversy having been actually decided the right of this court to review decision. [illegible] v. Butler, 180 U. S. 325, 330. All that is essential is that the Federal question must be presented in the State court in such a manner as to bring them to the attention of that tribunal. Chicago, etc., Ry. Co. v. Chicago, 166 U. S. 226. And of course, where it is shown by the record that the State court considered and decided the Federal question, the purpose of the statute is subserved. And accordingly in the instance of the Federal question in the [illegible] that it was actually considered and decided by the [illegible] court that it has been held, although the ground only is that the raising of a Federal question is a condition for reviewing in the highest court of the State in the [illegible], and when a question is thus raised and it is actually considered and decided by the State court the right to review exists.

Mallett v. North Carolina, 181 U. S. 589, 593.*

Land and Water Co. v. San Jose Ranch Co., 189 U. S. 177.

The proceeding was to register title in land. The [illegible] claimed right under an act of Congress relating to the payment of land grants, 29 Stat., 350. The court, through Mr. Justice Brown, said:

* While the right under the act of 1887, then [illegible], was not originally specially set up and claimed by the plaintiff inasmuch as it was not an original right, but a right available in answer to the defense, it was duly pressed to have been insisted upon in the argument, and under the rule of this court, requiring the question to be set out in the record, it has been frequently held to be a sufficient compliance with the words "specially set up and claimed" that it was fully considered by the opinion of the court and ruled against the plaintiff in error. Murdock v. Memphis, 20 Wall., 590, 633; Crane v. U. S. Mortgage Co., 140 U. S. 477; Philadelphia Fire Association v. N. Y., 119 U. S. 110, 116; Egan v. Hart, 165 U. S. 188. Aymette v. Bowen, 179 U. S., 230, 234. Mallett v. N. C., 181 U. S. 589. [illegible] must be considered as having made one change of rule in a [illegible]

ferent result from that reached in some prior cases, Williams *v.* Norris, 12 Wheat., 117; Rector *v.* Ashley, 6 Wall., 142, and Gibson *v.* Chouteau, 8 Wall., 314, in which we held that the opinion of the State court could not be resorted to for the purpose of showing that a question of Federal cognizance was decided."

In *Crowell vs. Randall*, 10 Peters, 368, this court, through Mr. Justice Story, also said:

"In the interpretation of this section of the act of 1789, it has been uniformly held, that to give this court appellate jurisdiction two things should have occurred and be apparent in the record: First, that some one of the questions stated in the section did arise in the court below; and secondly, that a decision was actually made thereon by the same court, in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show that such a question might have occurred, or such a decision might have been made in the court below. It must be demonstrable that they did exist, and were made. The principal, perhaps the only important difficulty which has ever been felt by the court, has been in ascertaining in particular cases whether these matters (the question and decision) were apparent on the record. *And here the doctrine of the court has been that it is not indispensable that it should appear on the record, in totidem verbis, or by direct and positive statement, that the question was made and the decision given by the court below on the very point; but that it is sufficient, if it is clear, from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment.*" (The italics are ours.)

In *Logan County National Bank vs. Townsend*, 139 U. S., 67, it appeared that Townsend had sold to the bank certain bonds which the bank had agreed upon demand to replace to him at the same or a less price. Upon his subsequent demand the bank refused compliance, and thereupon Townsend brought his action in the State court against the bank

to recover the difference between the amount paid for the bonds and their value at the time of the demand.

In the fifth paragraph of its answer the bank pleaded the want of power on the part of its cashier to make the contract set out in the petition, and that the bank itself had no such power. The decision in the State court was against this defense. A question of jurisdiction was raised in the Supreme Court of the United States, which was disposed of in the following language:

"Upon the question raised by the defendant in error as to the jurisdiction of this court, it is sufficient to say that the fifth paragraph of the answer, to which a demurrer was sustained, and one of the defendant's requests for instructions, which was refused, proceeded alike upon the ground that the bank was forbidden by the National Banking act to make the contract or agreement set out in the petition, and, consequently, that it was exempted from liability to the plaintiff upon any ground whatever. The exemption or immunity thus specially set up in the court of original jurisdiction, and re-asserted in the court of appeals of Kentucky, having been denied by the judgment, the authority of this court to re-examine that judgment, so far as it determines that no such exemption or immunity as that claimed by the bank, under the act of Congress, exists, is entirely clear. That the court of appeals of Kentucky may have held the bank liable independently of the question whether the act of Congress forbade or did not forbid a national bank from making such a contract as the petition recites, does not show a want of jurisdiction in this court; for the defendant's contention was, and is, that consistently with the act of Congress it cannot be held liable to the plaintiff upon any ground. *So that the judgment necessarily determined, adversely to the bank, that it had no such exemption or immunity as it asserts in virtue of the National Banking act.*" (The italics are ours.)

(*b.*) *Definition of usury and its penalties are Federal questions.*

In *Haseltine vs. Central Bank of Springfield*, 183 U. S., 134, this court, by Mr. Justice Brown, said:

"*We understand it to be conceded that, as the note in question was given to a national bank, the definition of usury and the*

penalties affixed thereto must be determined by the National Banking law and not by the law of the State. Farmers' & Mechanics' Bank vs. Dearing, 91 U. S., 29. In that case, it was held that a law of New York forfeiting the entire debt for usury was superseded by the National Banking act, and that such law was only to be regarded in determining the penalty for usury." (Italics ours.)

The penalties prescribed by section 5198 of the National Banking act are exclusive, and the usury laws of the State have no application to national banks in so far as such penalties are concerned.

Farmers' & Mechanics' Bank vs. Dearing, 91 U. S., 29.

To subject a bank to the penalty for taking usurious interest there must have been not only a larger rate of interest than allowed by the State law, but the larger rate must have been knowingly received.

National Banking act, sec. 5198.

And this must not only be alleged, but proven.

Henderson vs. Albes, 15 S. W., 132.

"Where a statute prescribes a rate of interest, and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken, and void only as to the excess. *Burnhisel vs. Firman*, assignee, 22 Wall., 170; *German vs. Calvert*, 12 Serg. & R., 46. Forfeitures are not favored in the law. Courts always incline against them. *Marshall vs. Vicksburg*, 15 Wall., 156. When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred. Nattel, 20th Rule of Construction."

Farmers' & Mechanics' Nat'l Bank vs. Dearing, 91 U. S., 35.

(c.) *The National Banking act authorizes the taking of the highest rate allowed by the laws of the State.*

The language of that act permits in express terms the taking of interest "at the rate allowed by the laws of the

State." Manifestly the State cannot prescribe for the General Government how that rate must be contracted for. Such a claim is preposterous.

By the first sentence of section 5197 of the National Banking act the rate of interest in this case is 8 per cent. By the second sentence of this section the rate is 7 per cent. In both cases the question is for this court to say whether either of those rates are exceeded. The same rules of construction and the same principles of law apply to both.

If under the second sentence there is no usury on a given state of facts, then of necessity there will be no usury on the same state of facts under the first. In both cases it is a question of construction and general commercial law to be determined by this court.

If said section had provided that national banks should collect interest "at the rate allowed and upon the rules and conditions established by the States in which they are located and no more," then there might be good ground for respondent's contention. The rate only is inserted in the national law under certain conditions, and when the rate is once fixed the power of the State ceases.

(*d.*) *De minimis.*

The record also shows that the bank acted in good faith throughout, not at any time taking even 7½ per cent. on the entire transaction, although on the overdrafts, if considered separately, it did possibly take usurious interest. The overdrafts are as follows:

July 12, 1895, $596.74. Of this amount $569.74 was the actual overdraft and the balance consisted of penalties of interest charged monthly on account thereof—that is to say, $27, one-third of which was excessive at 8 per cent. It should have charged $18. On April 29 the overdraft was $919.90; the actual overdraft was $876.36, and the balance

consisted of the monthly charges—that is to say, interest was $43.54. The rightful interest would have been $29.03.

Concerning these trifling sums the State judge should have said *de minimis lex non curat.*

(e.) *The agreement to pay interest on the installments was in writing.*

There was due on the original Mason note of $15,000 three semi-annual installments of interest of $525 each and interest on the overdue interest from the time it was due to the date of the note as well as said overdraft of $596.74 (Printed Record, page 60). Because Donnell had not paid his overdue interest on the $15,000 note for more than a year and a half, and it bore 7 per cent., he was charged, when the new note was given, 7 per cent. on the overdue installments of interest. This is also said to be usurious, because the agreement was not in writing. The agreement was in writing, because it was put in writing when the note was given and when the original note was given (Printed Record, 27).

In other words, a note was given for $15,000, bearing 7 per cent. interest, payable semi-annually. Three installments of interest for $525 were not paid, but a new note was given for the principal sum and unpaid installments of interest and interest upon said unpaid installments at 7 per cent. from the time they became due respectively. This is said to be usurious, notwithstanding the conceded fact that this bank did not get the highest rate allowed by the State by several dollars, and the reasons given by the learned judge in his opinion are two:

First. Because the contract was not in writing, when the very agreement to pay such interest on the notes was reduced to writing by the new note given.

Second. Because it was compounding interest semi-annually instead of annually, as against the statute (Printed Record, 102, 103, 104).

(f.) The question of what is compound interest and what is not is necessarily to be determined by this court.

The State law fixes the rate of interest, but in no other respect does it bear on the case. That rate in this instance is 8 per cent. per annum, and the State law inserts that rate into the National Banking act, so far as this case is concerned, *but it does not insert any provision concerning the compounding of interest, nor does it make the National Banking act say that parties shall not compound interest*, nor does it prescribe any penalty for compounding interest.

This is recognized in *Haseltine vs. Bank*, 183 U. S., 132, because "the *definition of usury* and the penalties affixed thereto must be determined by the National Banking act, and not by the law of the State."

It is a question of commercial law, and it is determined by this court as a question of the law merchant generally, and it does not rest on the insufficient conclusion of any particular judge of any particular State court.

A national bank is allowed by law to take, reserve, and receive the highest rate of interest allowed by the laws of the State. The banking act does not prescribe the form of the contract. It has the undoubted right to collect the highest rate of interest allowed by the State. It is claimed that because there was only a verbal agreement on the part of Donnell to pay interest on the unpaid installment of interest at the rate that the principal debt bore—that is to say, 7 per cent. which agreement was reduced to writing by the giving of a note for the unpaid interest and interest on said unpaid interest and the principal debt at 7 per cent.—that this was not such an agreement as was demanded by the statute of Missouri. Our contention was that the note itself was a

writing, but the court did not so hold (printed Record, page 103).

This conclusion is against all authority on this subject, as we will hereinafter show. But, be this as it may, since the National Banking act gave to this bank the right of collecting the highest rate of interest allowed by the laws of the State, this right cannot be taken away by the legislature of any State or any State judge. Our further contention was that under the National Banking act a parol agreement to pay less than the highest rate of interest could not be usurious.

The right to collect the highest rate of interest does not depend upon the formalities prescribed by the State, but upon the general principles of law to be declared by this court. If the State should enact a statute that no interest shall be collected by national banks on a debt at 8 per cent. or at a lower rate unless the agreement therefor is evidenced by a bond, witnessed and duly acknowledged and recorded as a deed, would such legislation be of any value as against one of the fiscal agencies of the General Government? This illustration may be extreme, but, in view of the decisions and legislation that have been attempted in the interests of State institutions and private bankers as against national banks, it may be worthy of consideration.

The methods of business to be pursued by a national bank cannot be prescribed by a State statute; they rest upon higher authority.

In Tyler on Usury, page 244, is the following statement:

"In a case in the late court of chancery of the State of N. Y., it was held that a note payable one year from date, with interest quarterly, was not usurious (Mowry *v.* Bishop, 5 Paige's R., 98). And the question is set at rest by a recent decision of the Supreme Court of the United States, which holds that, where a statute fixes the rate of interest per annum, a contract may lawfully be made for the payment of that rate before the principal becomes due, at periods shorter than a year. The action was upon a bond of the city of Muscatine,

in which the interest was made payable semi-annually at ten per cent., and by statute the city had no power to issue its bonds agreeing to pay interest at a greater rate than 10 per cent. per annum. It was insisted, among other things, that the bond was not valid, because, in the stipulation to pay the interest semi-annually, at the rate of 10 per cent., the authority conferred by the vote which limited the rate of interest to 'not higher than 10 per cent. per annum,' was transcended, and a usurious rate agreed to be paid. Mr. Justice Swayne delivered the opinion of the court, and disposed of this position of the defendant in a very few words. He said: 'The objection has no foundation. When a statute fixes the rate of interest per annum, it has always been held that parties may lawfully contract for the payment of that rate, before the principal debt becomes due, at periods shorter than a year' (Meyer *v.* The City of Muscatine, 1 Wall. R., 384, 391). The authority is decisive upon the subject, and further citations need not be made. The rule is well settled, and uniformly recognized in all of the States."

It may be said to be a settled law that promises to pay the highest legal rate of interest semi-annually or quarterly are not usurious.

Hawley *vs.* Howell, 60 Iowa, 79.
Goodrich *vs.* Reynolds, 31 Ill., 490; 83 Am. Dec., 240.
Tallman *vs.* Truesdell, 3 Wis., 343.
Mowry *vs.* Shumway, 44 Conn., 493.
Brown *vs.* Vandyke, 8 N. J. Eq., 795.
Ragan *vs.* Day, 46 Iowa, 240.
Mann *vs.* Cross, 9 Iowa, 327.

In the Iowa case, Hawley *vs.* Howell, it is held:

"That a contract which provided for interest at the rate of 10 per cent. payable semiannually, and for interest at the rate of 10 per cent. on the semiannual installments of interest, after they became due, held not usurious."

Following Ragan *vs.* Day, 46 Iowa, 239.

(*g.*) *Compound interest is not of itself usurious.*

It is a conceded fact in this case that the total interest contracted for did not exceed 8 per cent. "It is settled," says the supreme court of Pennsylvania in Oyster *vs.* Longnecker, 16 Pa. St., 269, "that usury is not committed by payment of a premium less in amount than the legal interest. The offense consists by the statute in taking more than six per cent. on the loan and till more has been taken, the penalty is not incurred. Lamb *v.* Lindsey, 4 W. & Ser., 449; Fisher *v.* Beasley, 1 Doug., 235; Wade *v.* Wilson, 1 East., 195, and Scurry *v.* Freeman, 2 Bos. & Pul., 381, are sufficient for the principle."

See also the following authorities to the same effect: Upton *vs.* O'Donahue, 32 Neb., 565; 49 N. W. Rep., 267; Mills *vs.* Johnson, 23 Texas, 308; Brestle *vs.* Mehaffie, 19 Pa. St., 117; Dey *vs.* Dunham, 2 Johns. Ch., 182; Tefoel *vs.* Saunders County National Bank, 24 Neb., 815; Smith *vs.* Parsons, 55 Minn., 520; 57 N. W. Rep., 311.

"Where the bonus paid to either the lender or his agent, added to the interest upon the loan, does not exceed in amount the highest lawful interest, there is no violation of the laws against usury.

"Thus, in the case of Brown *v.* Scottish American Mortgage Co., it is held, that where the lawful rate of interest is 10 per cent. per annum and a borrower gives his note for $4,500 payable in 5 years, with nine per cent. interest, the fact that the agent negotiating the loan retained $225 is not usury, that sum being equivalent to only one per cent. interest on $4,500 for five years."

Webb on Usury, sec. 100, p. 112, citing the foregoing authorities and 110 Ill., 235.

"If the amount of interest and commissions collected does not exceed the amount of interest allowable by the highest legal rate, there is no usury. So, where the amount of interest collected in advance together with the interest upon it, at the highest lawful rate, does not aggregate more than would be allowed by law as interest upon the principal,

there can be no usury. Upon this theory it is held, that there is no usury where the bond of the debtor bears no interest but includes the amount of the debt with the interest upon it to the time of the maturity of the bond.

Webb on Usury, § 115.

See also the following authorities:

Weaver vs. Paris Exchange Bank, 53 Texas, 561.

Mills vs. Johnson, 23 Texas, 329.

Camp vs. Bates, 11 Conn., 495.

Wilcox vs. Howland, 23 Pick., 169.

"The mere compounding of interest is not of itself usurious. *Mills vs. Johnson*, 23 Tex., 330; *Andrews vs. Hoxie*, 5 Tex., 194; *Miner vs. Bank*, 53 Tex., 561; *Martin vs. Bank*, 5 Tex. Civ. App., 171, 23 S. W., 1032. But if interest be provided for which exceeds the highest rate allowed by statute, it will be usurious, by whatever mode it is to be computed. If, by compounding, the limit prescribed by law is not exceeded, there is no violation of law, but if by compounding the limit is exceeded, it is a violation of the law. *Watson vs. Mims*, 56 Texas, 451. The form of the contract is immaterial. No device to evade the law will be upheld by the courts. *Mitchell vs. Napier*, 22 Tex., 121; *Crozier vs. Stephens*, 2 Wilson, Civ. Cas. Ct. App., section 802. The question is, Does the contract or do the facts show an intention to pay or receive a greater interest than is allowed by law? In *Martin vs. Bank*, *supra*, in which it was decided that compounding interest was not of itself usurious, an examination of the facts will show that the principal debt only bore 10 per cent. interest; that the coupons representing the accruing interest called for 12 per cent. per annum interest; and a calculation will show that the interest on the debt and on the coupons, taken together, would be but a fraction over 11 per cent. per annum, the law at that time allowing 12 per cent. Clearly there was no usury in the contract. The case of *Miner vs. Bank*, *supra*, decides that the renewal of a note in consideration of extension of time of payment, including both principal and interest, the new note bearing the highest rate of interest, would not be illegal upon the ground of usury."

***Brown vs. Crow*, 29 S. W. Rep., 653.**

(h.) Compound interest at the highest rate allowed by law is not unlawful.

"Contracts for the taking of compound interest may be classed into those made contemporaneously with the execution of the loan contract, and those made at the time of the maturity of the loan contract or subsequent thereto.

* * * * * * *

"As to the last-named class of agreements it is generally accepted as settled that they are not usurious, especially true is this when they are made after the maturity of the loan contract, as an incident to its extension. It is plain that when an interest-bearing obligation matures the interest is payable as positively as is the principal. The creditor is entitled to receive the interest as much as he is entitled to receive the principal. The debtor should no more retain the interest, which has been earned and is payable, without paying interest upon it, than he should retain the principal without compensation for it. The propriety of past-due principal bearing interest is never doubted; for what reason, then, should the propriety of past-due interest bearing interest be doubted? A different view reflects upon the justice and propriety of interest and usury laws. A different view indicates a distinction between principal money and interest money. The one would thereby be considered fruitful, the other barren. The one would be the proper foundation of a contract, the other not. The profit of one would be legal, but gain based upon the other, illegal and unrighteous."

Webb on Usury, § 123, page 138.

In the case of Wilcox *vs.* Howland, 23 Pick., 167, Shaw, C. J., says:

"The result of the doctrines upon this subject seems to be, that a contract to pay compound interest, is not usurious or void; that an agreement to pay interest annually or semi-annually, is valid and may be enforced by action; that a claim for interest upon such interest is an equitable claim, but that on an action brought, interest will not be allowed on interest from the time it fell due, because it would savor of usury, and because the holder of the note, by forbearing to call for his interest, when it became due, shall be deemed

to have waived his right to have the interest converted into capital. But if a party will deliberately give a new note on that consideration we cannot say that is illegal or made without consideration. It is very analogous to those cases, where there is a good demand, but where the law, upon consideration of policy, will raise no implied promise to pay it."

In the early Connecticut case of Camp *vs.* Bates, 11 Conn., 487, the facts, in substance, were that A gave to B a promissory note dated January 1, 1829, payable in two years, with annual interest. No payment or demand of payment was made until February 14, 1832, when A and B came together, and B proposed that the interest on the note should be computed, together with the interest of that interest, up to January 1, 1832, and, such compound interest being added to the principal, a new note should be given for the amount, payable in two years, with interest annually from January 1, 1832, and that, on A's compliance with this proposition, B would extend the time of the payment of the debt until January 1, 1834. The pecuniary circumstances of A were such at this time that he could not pay the debt until January 1, 1834. The pecuniary circumstances of A were such at this time that he could not pay the debt without a great sacrifice of property, to prevent which, and also to avoid being arrested for the debt, he acceded to such proposition and gave his note accordingly. In an action on such note it was held that it was not usurious.

This case was followed in Mocher *vs.* Chapin, 12 Wis., 453:

"It is well established that the parties to an interest-bearing loan which has matured, may agree that, in consideration of the extension of the time of payment, the accrued interest should be included in the new principal and the aggregate sum draw interest thereafter. Thus, it has been judicially said: 'A sum of money due for interest, is as justly and fairly due as for any other consideration, and an agreement to pay interest upon it after it is due cannot be deemed usurious.

Courts have been indisposed to compute interest upon interest, where the contract between the parties was silent. But if when interest is due and payable and constitutes a then subsisting debt, the debtor ask to retain it, and pay interest upon the amount at a legal rate of interest, the agreement is not usurious. It is nothing more than an agreement to pay legal interest for the forbearance of enforcing the collection of a debt then actually due and demandable.' This rule is so firmly fixed that it is hardly necessary to cite numerous authorities in support of it."

Webb on Usury, § 125, citing—

Perkins *v.* Coleman, 51 Miss., 278; Parham *v.* Pulliam, 5 Coldw., 497; Craig *v.* McCulloch, 20 W. Va., 148; Greenleaf *v.* Kellogg, 2 Mass., 568; Pinkard *v.* Ponder, 6 Ga., 253; Utley *v.* Cavender, 31 S. C., 282; 9 S. E. Rep., 957; Bank *v.* McClenman, 24 Ind., 62; Fitzhugh *v.* McPherson, 3 Gill, 408; Quimby *v.* Cook, 10 Allen, 32; Hale *v.* Hale, 1 Coldw., 233; Tyler *v.* Yates, 3 Barb., 222; Forbes *v.* Cantfield, 3 Ohio, 18; Sinclair *v.* Peebles, 5 Coldw., 584; Gilmore *v.* Bissell, 24 Ill. App., 481; 16 N. E. Rep., 925; 124 Ill., 488; Holland *v.* Mosteller, 6 Jones L., 582; Stewart *v.* Petree, 55 N. Y. 621; Austin *v.* Bacon, 28 Wis., 416; Hozer *v.* Blake, 16 Neb., 12; McGovern *v.* Union Mutual Life Insurance Co., 109 Ill., 151; Ellard *v.* Scottish-American Mortgage Co., 97 Ga., 329; 22 S. E. Rep., 893; Simpson *v.* Evans, 44 Minn., 419; 46 N. W. Rep., 908.

In the West Virginia case of Stansbury *v.* Stanbury the court, speaking through Green, J., said:

"Whatever diversity of opinion there may have been as to the circumstances under which compound interest or interest upon interest can be collected, there is one thing which must be regarded as definitely settled in Virginia and in this State, viz.: That an agreement to pay interest upon interest is valid, if made after the interest, which is to bear interest, has become due (Craig *v.* McCulloch, 20 W. Va., 154; Gerrin *v.* Ingersoll, 11 W. Va., 549; Pendall *v.* Bank of Marietta, 10 Leigh, 481; Childers *v.* Dean, 4 Rand., 406; Fully *v.* Davis, 26 Gratt., 903, 911). This is settled law with us, and, it seems to me, it has been correctly settled."

It matters not how many times a note may have been renewed and the interest in effect compounded.

In Camp *v.* Bates, 11 Conn., 495, the court says:

"It is admitted, the promissee of a note drawing annual interest, may collect the interest at the end of the year. He may do more. He may take a new note for the interest, payable with interest. At the end of the second year, he may take another note, for another year's interest on the principal sum lent, and a new note for the interest due upon the note given for interest, and that may be made payable with interest, and so he may continue to take new notes for interest, every year, until the loan is repaid (Greenleaf *v.* Kellogg, 2 Mass. Rep., 568; Tucker *v.* Randall, *Id.*, 284; Hastings *v.* Wiswall, 8 *Id.*, 455; Connecticut *v.* Jackson, 1 Johns. Ch. Rep., 17; Pierce *v.* Rowe, 1 N. Hamp. Rep., 179; Kennon *v.* Dickens, Cam. & Nor. Rep., 357). In all this there is not supposed to be any oppression, extortion, undue advantage, or the indulgence of inflamed avarice, or of a hardened heart, on the part of the creditor. Such notes are not only binding in conscience, but in law and equity."

"The receiving of interest upon interest is not a violation of the statute of usury as no more than seven per cent. is in such cases taken or received."

Stuart vs. Petree, 55 N. Y., 621.

"Interest actually compounded and added to principal does not give the creditor more than seven per cent. per annum for his money, and unless a rate of interest greater than that be taken, there is no usury. * * * Interest is justly and equitably due at the end of each year, if payable annually, and if the debtor, instead of paying it, gives his note or bond for it, there is no legal objection to enforcing its payment. * * * If the interest is carried into an account current and the debtor gives his note for the balance of the account, it stands, in principle, upon the same footing."

Kellogg v. Hickok, 1 Wend., 521.

"A sum of money due for interest is as justly and fairly due as for any other consideration, and an agreement to pay interest upon it after it is due cannot be deemed usurious.

Courts have been indisposed to compute interest upon interest where the contract between the parties was silent. But if, when the interest is due and payable, and constitutes a subsisting debt, the debtor asked to retain it and pay interest on the amount at the legal rate of interest, the agreement is not usurious. It is nothing more than an agreement to pay legal interest for the forbearance of enforcing the collection of the debt then actually due and demandable."

Fobes v. Cantfield, 3 Ohio, 18.

"Computation of interest upon interest turned into principal does not increase the rate of interest upon the original loan and is not usury. When the payment of interest at stated periods forms parts of the contract and upon the face of its payment at the times agreed upon, the payment of the principal is postponed to a distant day, interest may be recovered upon the interest from the time it falls due. After interest becomes due it may, by agreement, be turned into principal and bear interest."

Hale vs. Hale, 1 Cadw. (Tenn.), 233.

The original debt had semi-annual interest coupons attached, which by the terms of the note bore interest from maturity at 7 per cent., and the right to extend this obligation for three years more was given in express terms (Printed Record, p. 27).

There was also a distinct agreement when the notes were given that interest should be paid on the accrued interest (Printed Record, pp. 60, 61).

It has been frequently held by this court that independent of any contract to pay interest on coupons they bear interest from maturity. This is a question of general commercial law not controlled by State decision.

Gelpcke *vs.* City of Dubuque, 1 Wallace, l. c., 206.
Aurora City *vs.* West, 7 Wallace, l. c., 105.
Town of Genoa *vs.* Woodruff, 92 U. S., 502.

In Aurora City *vs.* West, 7 Wallace, l. c., 105, this court said:

"Bonds and coupons like these, by universal usage and consent, have all the qualities of commercial paper. Coupons are written contracts for the payment of a definite sum of money, on a given day, and being drawn and executed in a form and mode for the very purpose that they may be separated from the bonds, it is held that they are negotiable, and that a suit may be maintained on them without the necessity of producing the bonds to which they were attached. Interest, as a general rule, is due on a debt from the time that payment is unjustly refused, but a demand is not necessary on a bill or note payable on a given day. Being written contracts for the payment of money, and negotiable because payable to bearer and passing from hand to hand, as other negotiable instruments, it is quite apparent on general principles that they should draw interest after payment of the principal is unjustly neglected or refused. Where there is a contract to pay money on a day fixed, and the contract is broken, interest, as a general rule, is allowed, and that rule is universal in respect to bills and notes payable on time. Governed by that rule this court in the case of Gelpcke *v.* Dubuque, held that the plaintiff, in a case entirely analogous, was entitled to receive interest."

(*i.*) *Penalties on overdrafts not unlawful.*

The custom of stock brokers to debit and credit interest monthly, computing interest on balances, does not necessarily involve usury, as the balances may be paid.

Hatch *vs.* Douglass, 48 Conn., 116; 40 Am. Rep., 154.

There is a custom among bankers to charge on overdrafts a penalty. The defendant says:

"I knew all the banks were in the habit of charging on overdrafts, some charge more and some charge less" (Printed Record, p. 24).

These charges appeared in each monthly statement furnished to the respondent. The effect of these transactions was that if a party overdrew his account and did not make

it good before the end of the month he was charged on such overdraft. This is a penalty for honoring a man's check, which the law implied he should make good at once by other deposits.

It is a penalty that can be avoided by making good the overdraft at once. It is a debt that becomes due immediately and can be satisfied immediately.

It is in effect a stipulation between the bank and its customer that if the customer does not pay at once that which he should pay and which he can pay he may be charged a penalty therefor. Such penalties have been recognized time and again by the courts.

"Stipulations to the effect that, if the debt be not paid at maturity, it shall draw interest thereafter at a greater rate than the statutory limit, are now generally regarded as penalties to induce prompt payment, and as the debtor has it in his power to avoid paying the penalty by discharging the debt when due, such agreements are held free from usury."

27 Am. & Eng. Enc. of Law, p. 994; citing Upton *v.* O'Donahue, 32 Neb., 565; 49 N. W. Rep., 267; Burke *v.* Raah, 4 Ill. App., 338; Lawrence *v.* Cowles, 13 Ill., 577; Downey *v.* Beach, 78 Ill., 53; Fisher *v.* Ortis, 3 Chand.; 3 Pinn., 78; Chaffe *v.* Sanders, 46 Ark., 364; Jones *v.* Hubbard, 4 Call., 211; Call *v.* Scott, 4 Call., 492; Pollard *v.* Baylors, 6 Munf., 433; Wadsworth *v.* Champion, 1 Root, 393; Tuttle *v.* Clark, 4 Conn., 153; Cole *v.* Lockhart, 2 Ind., 631; Gambril *v.* Doe, 6 Blackf., 140; 44 Am. Dec., 760; Billingsley *v.* Dean, 11 Ind., 331; Sumner *v.* People, 29 N. Y., 337; Bank of Chenango *v.* Curtiss, 19 Johns., 326; Jansen *v.* Lewis, 2 Stew., 426; Rogers *v.* Sample, 33 Miss., 310; 69 Am. Dec., 349; Moore *v.* Hylton, 1 Dev. Eq., 429; Fisher *v.* Anderson, 25 Iowa, 28; 95 Am. Dec., 761; Watson *v.* McClanahan, 13 Ala., 57.

As was said by the court in a late Virginia case:

"A usurious agreement is one to pay originally a greater rate of interest than the law allows; if the obligor had paid

the debt when the bond became due, it would not have incurred, even under the literal terms of the bond, any liability to pay the illegal interest stipulated for after its maturity. Where the debtor, by a punctual payment of the debt, may thus relieve himself and avoid the payment of the illegal interest stipulated for, it is not usury."

The test of usury in such cases is, Has the debtor the absolute and unconditional right to discharge his obligations at maturity by paying the amount of the prescribed and lawful interest? As very concisely and correctly said by the court in the case of Gaar *vs.* Louisville Banking Co.:

"Wherever the debtor, by the terms of his contract, can avoid the payment of a larger by the payment of a smaller sum at an earlier day the contract is not usurious, but the difference between the sums is a penalty (Blydenburg on Usury, p. 39; Cullen *v.* How, 8 Mass., 257; Moore *v.* Hilton, 1 Dev. Eq., 429; Tyler on Usury, 97; Jordan *v.* Lewis, 2 Stewart, 426). But when he can discharge his contract according to its terms at maturity by the payment of the debt and lawful interest the contract is usurious."

Where a promissory note provides that if the principal is not paid when due a greater rate of interest shall be paid than is allowed by law, and it is made payable on so long a time as not to induce the belief that the interest clause was intended as an evasion of the statute, it will not be held to be usurious from such fact alone.

Wilday *vs.* Morrison, 66 Ill., 532.

In Gould *vs.* Bishop Hill Colony it is held that an agreement in a promissory note, payable in six months after its date, to pay 25 per cent. interest after maturity and until the note is paid, is not usurious.

35 Ill., 324.

So agreements to pay 24 per cent., 50 per cent., and 20 per cent. after maturity have been sustained.

Weyrich *vs.* Hobelman, 14 Neb., 432.

Wight *vs.* Shuck, 1 Morris, 425.

Conrad *vs.* Gibbon, 29 Iowa, 120.

In Gower *vs.* Carter it is held that an agreement to pay 2½ per cent. per month as a penalty in default of payment of a promissory note at maturity is not essentially different from an agreement to pay a gross sum as such a penalty; and it is a settled rule that no other sum can now be recovered under a penalty than that which shall compensate the plaintiff for his actual loss.

3 Iowa, 244; 66 Am. Rep., 71.

It is lawful to provide that if the debt be not paid at maturity the debtor may pay the creditor's attorneys' fees for the collection of the debt.

Fowler vs. Equitable Trust Co., 141 U. S., 384.
Smith vs. Silvers, 32 Ind., 321.
Daniels vs. Silvers, 32 Ind., 322.
Nelson vs. Everett, 29 Iowa, 184.
Dunn vs. Rogers, 43 Ill., 260.

(*j.*) *The right to determine this question should be wholly left to this court.*

After Congress gave to the national banks the absolute right to charge the highest rate of interest allowed by the various States in which they were established by its authority, it would be preposterous to say that it intended to allow each of the States and Territories to define for Congress what should be the penalties and what should not be for usury, and what should be the definition of usury for those banks and what should not.

The National Banking act does not pretend to do more than to allow the States to fix the rates of interest for the national banks under certain conditions. To have done more would have been clearly unwise, and a harmonious administration of the law relating to the most valuable fiscal agencies that were ever instituted in our Government, and without which our whole financial system would be incom-

plete, requires that the claim that the States or any of the courts of the States have authority to do more should be emphatically overruled. It would be a task of slight difficulty to contrive a system of legislation by a State or States unfriendly to these agencies of the General Government by declaring everything usurious which is not usurious according to the decisions of this court or of the law merchant and then fixing a punishment so trifling for the transactions which are so declared usurious that a national bank could not compete with a State bank, trust company, or private individuals. This was not the intention of Congress. To allow such a pretension would be most lamentable.

Therefore it is highly necessary that the General Government should retain itself the right to define what is usury and what is not. This right has not been surrendered, and there is no reason why it should be and every good reason why it should not.

It is said that this transaction is usurious because it resulted in the party paying interest twice a year at the rate of 7 per cent. per annum and interest on his defaulted interest at the same rate. It is not pretended anywhere that the payment of interest at any time equaled 8 per cent., so far as this indebtedness is concerned. The offense consists of this so-called compounding which was not compounding, according to any accepted definition of the term.

From this reasoning of the court it follows that if a private party or a municipality or a private corporation executes a note which bears 4 per cent. interest semi-annually, and it is provided in the note or the mortgage or in the coupons attached to the note that if the installments of interest are not paid they shall draw interest at 5 per cent. per annum, that the party loaning the money is a usurer, and that the party who has made the loan can escape paying interest, and the more he litigates the matter the more he can swindle the individual or the institution from which he has borrowed his money. If this be the law in Missouri, then thousands of

loans made by the banks, insurance companies, savings institutions, municipalities, such as towns, cities, school districts, and others, which bear 4 and 5 per cent. per annum, payable semi-annually, with coupons which bear the same rate, are each and all usurious, and that whole State is filled with a gang of usurers which deserves the criticism and condemnation which are indirectly put upon the plaintiff in this case in the opinion of this court.

If the decision of the supreme court of Missouri is correct, then a national bank which renews a note for a customer for ninety days or four months, because such customer is unable to pay the principal or interest, by taking a new note for such interest and principal, even though the rate be five (5%) per cent., such national bank is guilty of usury. It is perfectly plain that such consequences were not contemplated by Congress when it framed the National Bank act. Such a contention is against all reason and the whole current of the law in this country and England.

Banks, savings institutions, and trust companies are created by law not merely for commercial purposes, but to enable the people to get interest on their savings, and the savings are loaned out by these institutions to the merchants, manufactures, or private individuals. For such institutions to pay interest appears to be highly commendable, but to charge interest in order to enable them to pay it again to their depositors seems now, in the language of the opinion, to be something very much in the nature of a crime.

The State of Missouri may be compelled to submit to such a conclusion at least until it is again considered either judicially or legislatively, so far as its own institutions are concerned, but surely this is not required of the national banks

The inquiry suggests itself, even though the punishment of the usurer is slight under the State law, how can any State court "make the punishment fit the crime" when the rate of interest is 5 per cent., and there is no excess to be credited on the debt? The only benefit the usurer could

possibly obtain by making such a plea would be that he might escape paying the costs.

In the meantime national banks forfeit their entire interest if not paid and double the interest if paid. Is such a discrimination permissible?

(*k.*) *A parol agreement to pay interest upon interest is valid.*

Thayer vs. Star Mining Co., 105 Ill., 541, 553.

Fessenden vs. Taft (N. H.), 17 Atl. Rep., 713, 714.

Cameron vs. Bank, 37 Mich., 242, 244.

Brown vs. Cass County Bank (Iowa), 53 N. W. Rep., 410, 413.

Gill vs. First National Bank (S. D.), 57 N. W. Rep., 503.

First National Bank vs. Fenn (Iowa), 39 N. W., 279.

In the case of *First National Bank vs. Fenn, supra*, the supreme court of Iowa said:

"Evidence was admitted, against the objection of the plaintiff, tending to show that he had orally agreed to give his wife 10 per cent. interest on the money she let him have. It is urged that the court erred in so ruling because section 2077 of the code provides that the rate of interest shall be 6 per cent. unless the parties in writing agree to pay above that rate. The statute does not, in terms, prohibit the parties from agreeing orally to pay 10 per cent., and where this is done and the amount afterwards ascertained and an obligation in writing given therefor, we see no reason why such obligation cannot be enforced between the parties. The parol promise to pay was a sufficient consideration for the obligation. Clearly we think the defendant could not successfully plead that there was no consideration for the written promise."

(*l.*) *Where one debt is tainted with usury and the others are not, and all the debts are incorporated into one obligation, the tainted debt does not poison the whole.*

Even if the transactions respecting the overdrafts should be thought usurious and are not purged by the subsequent

arrangement when the notes were given, and the interest on the entire indebtedness was made less than 8 per cent., it can only affect the overdrafts themselves and not the principal part of the indebtedness.

"The mere fact that a note which, at the time of obtaining a new loan, was incorporated in a new note given for both debts, was tainted with usury, will not taint the new loan with usury."

Porter *vs.* Jeffries (S. Car., 1894), 18 S. E. Rep., 229.

Where a note is made up in part of a pre-existing debt, and in part of usurious interest on another account, the note is not void, but the maker is entitled to an abatement thereof to the extent of the usury.

Smith vs. Heath, 4 Daly (N. Y.), 123.

In *Farmers' & Mechanics' Bank vs. Hoagland*, 7 Fed., 159, the action was upon two notes, one for $3,618 and the other for $3,740.50. Each of these notes was the last renewal of a preceding series, the originals of which were each for $3,000, some five years prior in time. Each note had been renewed nineteen times and the usurious interest charged at the several renewals sometimes was paid, sometimes was included in whole or in part as new principal in the new renewal notes. The bank brought action upon these last notes and the question was raised whether it could recover any interest at all. It reads:

"The authorities therefore are decisive against the right of the plaintiff to recover any interest whatever upon the usurious transactions. It is to be added, however, that *one of the notes in suit includes an item of indebtedness of* $102 *growing out of an independent matter.*

"Upon the demurrer and under the stipulation of the parties, let final judgment be entered for the plaintiff, the judgment to include, first, the face amount of the original notes, to wit, $3,000 without interest; and *second, the sum of* $102, *with interest on the latter sum to be computed by the clerk.*"

This extract from this opinion, we think, properly interprets the spirit and intention of the National Banking act, and that is that there shall be no interest upon any debt tainted with usury, but there shall be interest upon such portions of the indebtedness as are not usurious and which may be separated. In that case $102 had been included in one of these renewals. It was not apparent from the renewal note itself, but only became so after the court had opened the entire transaction back through the nineteen renewals of the original debts, and it then became apparent that, somewhere along the line of these renewals, an innocent and unobjectionable debt had been consolidated with an usurious one, but for that reason interest was not lost upon the unobjectionable debt. So here we urge that, applying the same principle, when this $20,000 note is set aside, and when the $17,500 note is likewise set aside, and it appears that there is left the Mason indebtedness of $15,000 free from all objection of usury in itself, but coupled in these later notes with an objectionable and usurious other debt, that the only logical conclusion for the court to come to is that, having the right to so inspect the ultimate facts of these debts, it must separate the good from the bad, punish the plaintiff for that portion wherein it has transgressed the law, but not punish it for matters where there has been no transgression. In other words, there should be an accounting taken to ascertain the amount of the Mason indebtedness with interest to date, and judgment for that amount should be awarded to this plaintiff. So also with the note for $2,500.

There are numerous authorities which bear out this interpretation of the act. Thus in *Burnhisel vs. Firman*, 22 Wallace, 170, Mr. Justice Swayne said:

"It is a rule in equity that an incumbrance shall be kept alive or considered extinguished as shall most advance the justice of the case.

"The application of this principle occurs most frequently

in cases of usury. It is well settled that if a security founded upon a prior one be fatally tainted with that vice, and the prior one were free from it but given up and cancelled and the latter one thereafter be adjudged void, the prior one will be revived, and may be enforced as if the latter had not been given. The cases to this effect are very numerous. A vendor's lien may be revived under the same circumstances. *In the same suit, where there is a failure to recover upon the void security, the valid one, on account of which it was given, may be enforced.*"

In *Farmers' Bank vs. Joslyn*, 37 N. Y., 353, it was said:

"The infected contract did not absolve the mortgagor from his antecedent obligations, nor did it impair the rights of the plaintiff under a prior and valid agreement. It is true that the usurer is not permitted, at his own election, to allege his illegal act, as a ground for re-instating an old security; *but it is equally true that a party, who claims to be the victim of exaction, cannot avail himself of the invalidity of a later contract, as a shield from liability on one of earlier date, which was honest and free from vice* (*Brown v. Dewey*, 1 Sandf. Ch., 57; *Swartout v. Payne*, 19 Johns, 294; *Billington v. Wagner*, 33 N. Y., 31; *La Farge v. Harter*, 5 Seld., 241; *Crane v. Hubbel*, 7 Paige, 413)."

(*m.*) *Usury cannot be imputed in a transaction before it has arisen.*

The learned judge who wrote the opinion in this case, in his stern zeal to punish this national bank as a usurer when no such or similar punishment could be inflicted upon a State institution, went even so far as to eliminate all interest on the $15,000 note which was earned before any usury attached, according to his own opinion. There were three installments of interest due on that note of $525 each. He refused to allow this interest to be collected because this interest was incorporated in the new note and interest upon interest at 7 per cent. was agreed to be paid, orally and by the note itself, and the overdrafts in which the aggregate of the excessive interest did not exceed $45.72, therefore the whole transac-

tion became so offensive to him that it was held that the bank must obtain no interest, and thus for almost twelve years the bank which is expected and required to pay interest to its depositors has been deprived of interest on this indebtedness.

This clearly cannot be correct. The offense, if there were any offense, cannot go backward as well as forward. By the law of Missouri if usury is once paid it cannot be collected back.

Ferguson vs. Boden et al., 111 Mo., 208.
Ransom vs. Hayes, 39 Mo., 445.

(*n.*) *Charging interest on overdue interest is not compounding the interest.*

A very good explanation of the difference between compound interest and interest upon interest is found in vol. 16 Am. & Eng. Enc. of Law (2d ed.), page 1074. It is as follows:

"For the purpose of anything approaching a clear comprension of this very difficult subject, it will be necessary to observe at the outset, a distinction, rarely made plain by the cases, between interest compounded periodically and simple interest on deferred installments of interest after payments should have been made. All interest on interest is frequently designated compound interest, but interest compounded annually or periodically involves a different method of computation and a different result from mere simple interest on annual or periodic interest. By the former method interest on interest, and so on *ad infinitum*, will bear interest, while in the latter case it is only the interest on the original principal sum upon which interest is given."

(o.) *When an action is brought by a national bank on a note executed in its favor and usury is pleaded, the court will permit such bank to remit the excessive interest stipulated for and recover the debt, with legal interest. This is especially true when a transaction is in good faith and there was no intention to violate the law.*

This court in *Brown vs. Marion National Bank*, 169 U. S., 416, 419, through Mr. Justice Harlan, said:

"If the note *when sued on* includes usurious interest or interest upon usurious interest, agreed to be paid, the holder may in due time, elect to remit such interest, and it cannot then be said that usurious interest was paid to him." (Italics ours.)

Again in *McBroom vs. Scottish Investment Co.*, 153 U. S., 318–328, this court said:

"In *Duncan v. First Nat. Bank of Mount Pleasant*, in the district court of the United States for the western district of Pennsylvania, it was said: 'From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal, or up to the time of entering judgment, there is a *locus penitentiæ* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it and lessen the principal. * * * Up to that time he may make this election. When payment is actually made or judgment entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete.' Thompson's National Bank Cases, 360, 362.

"In *Stevens v. Lincoln*, 7 Met., 525, 528, which was an action, under a statute of Massachusetts, authorizing suit to recover threefold the amount of interest paid, it being alleged that interest had been paid at a greater rate than the law allowed, the court said: 'In regard to the payment of $1,458.91, whether this was a payment of the usurious interest or a part of it, we are of opinion, that while the usurious interest is unpaid, there remains the *locus peniten-*

tiæ; that the party may relinquish it, and recover for the balance of his debt—the contract not being rendered void by the statute. And in the absence of proof as to any appropriation of a partial payment, the law will apply a payment to the valid demand rather than to the illegal one; and the balance which remains unpaid, if it exceeds the usury agreed to be paid, includes the usury; so that, on one side, the debtor shall not recover back any part of that which he honestly owed, by the allegation, on his part, that the payment made by him was the payment of the usury; nor, on the other hand, will the law permit the creditor to secure to himself the avails of his illegal contract, and when he sues for the balance due on the contract, to aver that the usurious interest was contained in the previous payment, and that the residue is justly due.' The same rule was affirmed in *Saunders v. Lambert*, 7 Gray, 484, 486.

"So in *Harvey v. National Life Ins. Co.*, 60 Vermont, 209, 211: 'As the result of that transaction the plaintiff went away with nine hundred dollars in money—all he had ever received from the defendant as his own money, and the defendant with the plaintiff's note for $1,000 * * * Hence the one hundred dollars usury entered into and became a part of the mortgage note. The payments made by the plaintiff and by Mrs. Hardaker prior to the time of taking up the note, would in law be applied toward the payment of the legal portion of the note. * * * All the payments made by her, as well as those made by the plaintiff, up to the final payment, were in law to be applied towards the liquidation of the legal portion of the note. Hence the plaintiff is entitled to recover what was paid as the final payment of the note, above what was then legally due upon the note after applying the payments made thereon in liquidation of the legal portion of the note with interest.' To the same effect are the following authorities: *Kendall v. Crouch*, 88 Kentucky, 199, 202; *Smith v. Robinson*, 10 Allen, 130, 132; *Hawkins v. Welsh*, 8 Missouri, 490, 492; *Hall v. Fairfield Bank*, 30 Nebraska, 99, 102; *Jackson v. Garner*, 79 Georgia, 415."

"In *Wright v. Laing*, 3 B. & C., 165, 169, which was an action to recover the penalties of the statute of usury, Abbott, C. J., said: 'None of the payments were appropriated by either party at the times of payment. If the law ought now to make such an appropriation as the pleader has sup-

posed in this count, the count will be sustained by the proof otherwise not. We think the law ought now to make such an appropriation. And such an appropriation works no prejudice to the party; it leaves him only where by his own conduct he placed himself; and in the case I have put of the payment of one bill and the non-payment of the other, if an action for the penalties of the statute should be brought, the same principle of law would protect the defendant, by applying the payment of the first bill to the legal demand, and not permitting the then plaintiff to apply it to the illegal demand, that is to the loan and interest, although it be precisely of the same amount; *because, peradventure, the lender might repent the illegal bargain and refuse to receive the full amount of the second bill, and the law will allow him the opportunity of doing so, that he might not be deemed a receiver of the usurious interest, without clear evidence that he had not only bargained to receive, but had actually received, such interest.* And if the law will make this appropriation of the payment in the one instance against the lender, and to prevent him from enforcing an illegal bargain, and in the other instance in favor of the lender, and to protect him from being subject to a penalty for an illegal *bargain only*, it seems very plainly to follow that a similar appropriation ought to be made by law in the case before the court. * * * And this, in effect, is only saying that where a person has two demands, one recognized by law, the other arising on a matter forbidden by law, and an unappropriated payment is made to him, the law will afterwards appropriate it to the demand which it acknowledges, and not to the demand which it prohibits.'" (Italics ours).

The foregoing right to remit the excessive interest and to charge all legal interest was expressly denied. It was claimed by the bank in its brief (Printed Record, page 88), also in its argument for rehearing (page 117). It was overruled in the opinion of the court (page 109 of the Printed Record).

As soon as the State court found that there was usury, and the bank had been mistaken in its conclusions as to there being usury in the transaction, and before final judgment could be entered up in the case, in fact before the case was

heard before the court *en banc*, this right to remit the excessive interest was asked for and denied. But the appellate judge, after such demand was made, ordered the judgment of the trial court to be reversed and set aside, and judgment according to the opinion he announced to be entered up in the trial court.

It will be remembered that it was denied that there was any usury in the replication of the bank to Donnell's answer. The referee in the trial court found that there was no usury on the facts (pages 59, 60, 61, 62, 63), and the judgment went for the bank in the trial court.

It is for this court to define what is or what is not compound interest. But if compound interest had been charged, it is not prohibited by the National Banking act.

For the foregoing reasons the motion to dismiss for want of jurisdiction and the motion to affirm the judgment should both be overruled and the action of the supreme court of Missouri should be set aside, and the judgment of the trial court affirmed.

Respectfully submitted,

OLIVER H. DEAN,
WILLIAM D. MCLEOD,
HALE HOLDEN,
Attorneys and Counsel for Plaintiff in Error.

IN THE

Supreme Court of The United States.

October Term, 1903.

THE CITIZENS NATIONAL BANK of Kansas City, Mo.,
Plaintiff in Error,
vs.
M. S. C. DONNELL,
Defendant in Error.

File No. 18,933.
Term No. 283.

MOTION TO DISMISS WRIT OF ERROR.

Comes now the said M. S. C. Donnell, the defendant in error, by his counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction, for the following reasons, to-wit:

1. Because it appears upon the face of the record that this Court has no jurisdiction to re-examine and review the finding, judgment and decree, of the Supreme Court of Missouri, rendered in said cause.

2. For the reason that the record shows that the decision of the Supreme Court of Missouri, which is sought to be reviewed by this writ of error, was based upon a suit by plaintiff in error on a plain promissory note; that neither in its petition, reply, nor in any other action did

plaintiff set up or claim specially any "title, right, privilege or immunity" allowed it under the Federal laws; and that the only claim under the Federal laws was made by the defendant in error in his answer to plaintiff's petition, wherein he claimed that under Sections 5197 and 5198 of the National Banking Act, the plaintiff had, by charging him usury, forfeited all right to collect interest which the note in question carried with it or which was agreed to be paid thereon, and the decision of the Supreme Court of Missouri was in *favor of* and not *against* the rights claimed under the Federal laws.

3. The formal claim made by plaintiff in error, that it was denied the right of charging interest on a note contrary to said Sections 5197 and 5198 of the National Banking Act, and that it was deprived of rights given it under said section, was not made in the trial Court by any pleading, motion, exception, or other action and was not made until made in a motion for rehearing in the Supreme Court of Missouri after said cause was finally heard and determined by said Court, and was therefore made too late, it being well settled that this Court will not entertain jurisdiction to re-examine and review the decision of the Supreme Court of a state when the federal question is raised for the first time on a motion for rehearing.

4. For the reason that under Section 5197 of the National Banking Act, the plaintiff was not given any special right to charge interest on its transactions other than was allowed by the laws of Missouri where the bank was located, and the rate of interest which plaintiff was allowed to charge on its transactions, by the very terms of said section, was governed entirely by the local laws of Mis-

souri, and this Court does not interfere with the decisions of the Supreme Court of a state construing its own statutes.

5. The record shows that the decision of the Supreme Court of Missouri, in this cause, turned wholly upon a question of fact—, *i. e.*, did the plaintiff charge interest at a greater rate than was allowed by the laws of Missouri —and upon the construction of the statutes of Missouri as to the rate of interest allowed to be charged thereby, and the Supreme Court of Missouri decided as a matter of fact and in construing its own statutes, that the plaintiff did charge interest at a greater rate than was allowed by the laws of Missouri, and this Court will not review the decision of the Supreme Court of a state as to questions of fact decided, nor on the construction placed upon its own statutes.

MOTION TO AFFIRM.

And the said defendant in error, by his counsel as aforesaid, also moves this Court to affirm the said judgment and decree rendered in the above entitled cause by the Supreme Court of the State of Missouri, because although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that this writ of error was sued out for delay only, and that the questions upon which the jurisdiction of this Court depends are so frivolous as not to need further argument, and for the further reason that the question upon which the jurisdiction of this Court depends, is wholly formal, and so absolutely devoid of merit as to be frivolous, such question having been foreclosed, by a long and unbroken

line of decisions of this Court against the contention of the plaintiff in error. The record shows conclusively that the constructions placed upon Sections 5197 and 5198 of the Revised Statutes of the United States, by the Supreme Court of Missouri, in the said cause, was in exact accordance with the very plain language of the statute and of the uniform decisions of this Court. The only construction placed upon the statute was, that by taking, receiving, reserving and charging interest at a greater rate than was allowed by the laws of the state in which it was doing business, the plaintiff bank forfeited all right to collect any interest on the transaction in question. No other construction could be placed upon the plain language of the statute, and no other construction was contended for at any time by the plaintiff in error.

The record shows that the case turned entirely upon the question of fact as to whether the plaintiff charged interest at a greater rate than was allowed by the laws of Missouri, and upon the construction of the interest laws of Missouri, questions which this Court will not review.

Respectfully submitted,

EDWARD P. GARNETT,

Counsel for the Defendant in Error for the purposes of the Motion.

Mr. Oliver H. Dean,

Counsel for Plaintiff in Error:

Please take notice that on Monday, the 21st day of March, A. D. 1904, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of said Court

thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

EDWARD P. GARNETT,
Counsel for the Defendant in Error
for the Purposes of These Motions.

STATEMENT.

This action was begun in the trial Court by the plaintiff in error, and was an ordinary suit on a note for $20,000.00, executed by the defendant in error. Plaintiff's petition, omitting the caption, was as follows, to-wit:

PETITION.

Plaintiff for its cause of action against the defendant states:

First. That it is and was at all times hereinafter mentioned a corporation duly organized and existing under the laws of the United States relating to National Banks.

Second. That on, to-wit, the 29th day of April, 1896, said defendant, under and by the name of M. S. C. Donnell, made, executed and delivered his certain negotiable promissory note expressed to be for value received, a duly verified copy of which is herewith filed, whereby he promised to pay to plaintiff, or order, on demand, the sum of twenty thousand dollars ($20,000.00) at the office of plaintiff in Kansas City, Missouri, with interest from date thereof at eight per cent per annum until paid; that payment of said note has often been demanded of defendant, but defendant has failed and refused to pay the same, and said note remains overdue and unpaid; and plaintiff is the legal owner and holder thereof.

Wherefore, plaintiff asks judgment against the defendant for the sum of twenty thousand dollars ($20,000), with interest thereon from the 29th day of April, 1896, at the rate of eight per cent per annum and for its costs." (Record page 5).

ANSWER.

Defendant filed answer, admitting the execution of the note, but claiming that the plaintiff was not entitled to collect any interest which the note "carried with it or which was agreed to be paid thereon," for the reason that the plaintiff had charged usury on the items which were calculated into the note and which became a part thereof.

The answer set up the different items which were calculated into the note, claiming that each and every one of them was tainted with usury.

Plaintiff's reply is a specific denial of each charge of usury made in the answer, and concludes by asking "judgment as prayed in its petition herein." (Record page 7).

In the trial Court judgment was given for the plaintiff for the full amount of the note and interest, after giving credit for the amount collected by the plaintiff, since the commencement of suit, on collaterals held by it.

The case was appealed to the Supreme Court of Missouri by the defendant, where it was argued and submitted on the record and briefs filed. The Supreme Court of Missouri, in an elaborate opinion, in which all the facts are fully set out, and every item which entered into the note in question was carefully considered, found that "each and every one of them constituting it since June, 1893, was tainted with usury," and reversed the case with directions to the trial Court to enter up judgment for the amounts originally loaned without interest. (Record pages 91 to 110).

The case will be found reported in 72 S. W. Rep. 925.

After the decision was rendered plaintiff filed a motion for rehearing, in which was claimed for the first time, that the decision denied to the plaintiff the special right given it under Sections 5197 and 5198 of the National Banking Act, to collect interest on the transactions in question. (Record page 112).

The motion for rehearing was overruled, and the plaintiff sued out this writ of error.

The facts involved in the case as found by the Supreme Court of Missouri are as follows: (Record page 98).

"But in order to a better understanding of the facts out of which this litigation grew it will not be inappropriate to state them more in detail than did the referee.

"On October 29, 1892, defendant owed plaintiff bank $15,000 on the Mason note. On that day defendant paid $175 interest on said note at the rate of seven per cent per annum. This changed the semi-annual interest periods.

"On June 29th, 1893, he paid $525 more, interest to that date. Defendant was unable to pay the next semi-annual interest due December 29th, 1893, and the then president of plaintiff, Mr. Seeger, to avoid charging off the Mason note as bad paper, on June 30th, 1894, put in the cash drawer a sight draft on defendant for $525, in favor of S. W. Campbell, cashier, and this draft was carried as a cash item until February 18th, 1895, when defendant, having funds, gave plaintiff a check for it.

"In meantime, on or about June 1st, 1893, defendant's account with plaintiff began to be overdrawn. He says in his testimony that the bank consented to the overdraft, and this is not denied. On June 1st he was overdrawn $514.52 and on the 13th he reduced the overdraft to $473.52 and on the 2nd paid it. But for the interest on this overdraft for this time plaintiff inserted among defendant's checks a charge slip or check for $3.14 payable to "int. or bearer" and signed "chg. M. S. C. Donnell". This charge was at the rate of about one per cent per month and was the beginning of a series of transactions of a similar na-

ture. From June 30th, 1893, until July 13th, 1895, defendant's account was overdrawn in amounts ranging from $435.46 on the first named day, to $596.74 on the last. At the end of each month the plaintiff charged the defendant one per cent or more on his overdraft and put an interest charge slip among his checks and added this charge to the overdraft. This is shown clearly by the general account kept by the plaintiff, introduced in evidence by it. The interest charges on June 29th, 1895, had amounted to $122.50; the principal of the overdraft at that time was $474.24 and the defendant had been overdrawn from July, 1893, until July, 1895, only from $435.46 to $474.24, and the $122.50 represents the interest charged by plaintiff on $435.46 two years, or slightly over twelve per cent per annum. No demand was shown to have been made for payment of the overdraft.

"These interest charge checks were returned to defendant as vouchers.

"On July 12th, 1895, this indebtedness was renewed. Plaintiff's president, Mr. Seeger, computed defendant's debt on that day to be as follows:

Note $15,000 and interest 7 per cent from December 29th, 1893.

Semi-annual Int. due June 29th, 1894..	$ 525.00
Int. to December 29th, 1894.....	18.37
Semi-annual Int. due Dec. 29th, 1895..	525.00
Int. to June 29th, 1895.....	37.39
Semi-annual Int. due June 29th, 1895..	525.00
	$ 1,630.00
Note.	$15,000,00
Amt. due June 29th, 1895.....	$16,630.76
Int. to July 12th, 1895.	42.00
	$16,672.76
Overdraft.	596.74
	$17,269.50
Bal. Credit acct.	230.50
Amt. New notes.	$17,500.00

"This computation was by defendant introduced in evidence. It shows a compounding of interest every six months in violation of R. S. 1889, Sec. 5977 (R. S. 1899 Sec. 3711) and the charge of interest upon interest amounting to $59.93.

"To the total amount of principal and compound interest claimed to be due on the Mason note, $16,672.76 was added the overdraft consisting of principal $474.24 and one per cent per month interest thereon, amounting to $122.50 and to this was added a credit on general account of $827.24 which eliminated the overdraft and left $230.50 to be checked against. These items aggregated $17,500.00, and for this defendant gave his note on demand with 7 per cent interest from that date. Plaintiff retained the Mason note as 'collateral security'. The $17,500.00 note was introduced in evidence, being attached to the papers in the Carroll county case.

"Thus on July 12th, 1895, the $17,500.00 note was executed and it was composed of the principal of the Mason note. $15,000.00

The usurious interest calculated therein	1,672.76
The principal of the overdraft.....	475.24
The usury charged therein.	122.50
And a small credit account of.	230.50
	$17,500.00

"So that deducting the interest $1,672.76 and $122.50, in all $1,795.26, we have left $15,704.74 the amount of the principal on July 12th, 1895.

"On or about September 14th, 1895, defendant made three additional notes for $12,000, $6,000 and $10,000 respectively, due five years from date with interest at 6 per cent per annum, in favor of W. H. Seeger, secured by deeds of trust on real estate. Seeger indorsed and transferred these notes to plaintiff and it is now holding them also as collateral security.

"On October 1st, 1895, defendant made another note for $2,500, due on demand, with 7 per cent interest from date, and it was credited to defendant on the books of the bank. At this time defendant's account was overdrawn $267.30, including the usurious interest on the same and

calculated at the rate of one per cent a month, compounded monthly, and while defendant was given credit on plaintiff's books for $2,500, his net credit was only that amount less the amount of overdraft and usury calculated therein, and as this usurious charge was taken out of the $2,500 note it infected the same with usury from its inception. Defendant so testified and it is not disputed."

* * * * * * * * *

"Defendant was obliged to overdraw again and from November 2nd, 1895, until after the execution of the note sued on his account was overdrawn. The bank on November 30th, charged him $1.70 interest and thereafter on the last business day of each month charged him one per cent or more upon his overdraft and added it to the overdraft as before.

"On April 29th, 1896, this overdraft including excessive interest was $910.10. The officers of the bank computed the $17,500 note and $2,500 note from their respective dates with 7 per cent interest and added in the overdraft with its accumulated compounded interest, making the total $21,997.58. Defendant executed two notes payable on demand, one for $20,000 and the other for $2,000 with 8 per cent interest from date. The $20,000 note is the instrument in suit. Plaintiff eliminated the overdraft and credited to defendant on its books $2.42 net.

"On January 25th, 1898, certain of the real property described in the deed of trust securing in part the payment of the $6,000 'collateral' note was sold and $5,500 was the net proceeds, and the defendant notified the plaintiff to apply the fund to the payment of the said collateral notes for $6,000 but defendant applied it instead to payment of interest on the notes for $22,000 and the balance on the principal of these notes.

"And by agreement of parties a transcript of the general account of M. S. C. Donnell, as shown by the books of plaintiff, from October 14th, 1892, to May 1st, 1896, was introduced in evidence and attached to the report of the referee. It shows a continuous account and transaction between plaintiff and defendant between said dates, and that the note in suit and its antecedents are all a part of said continuous transaction. Every month defendant

was charged interest at the rate of one per cent per month compounded monthly on the overdrafts beginning in June, 1893, and culminating April 29th, 1896, in the $20,000 note in suit and in the $2,000 note in the Carroll county case.

"These transactions show the following:

The Mason note upon which the interest was paid to Dec. 29th, 1893....	$15,000.00
July 12th, 1895, overdraft less interest figured in the note of $17,500.00..	474.24
July 12th, 1895, net credit on bank account.	230.00
October 1st, 1895, credit by note of that date.	2,500.00
April 29th, 1896, principal of overdraft	874.81
April 29th, 1896, credit on account....	2.42
	$18.081.97
January 25th, 1898, credit by proceeds of col.	5,500.00
	$13,581.97

The balance of the note is interest."

After discussing in detail the items which entered into the note the Court says:

"The bank had no right to charge any interest not allowed by the laws of Missouri. The Banking Act says so in plain words. The laws of Missouri did not permit the compounding of the interest on the Mason note oftener than once a year. Therefore when the bank compounded the interest on the Mason note oftener than once a year it did that which it was not allowed to do by the laws of Missouri and in so doing violated the National Banking Act and subjected itself to the penalties therein provided.

"The record shows that the $15,000 note bore interest at 7 per cent per annum and that notwithstanding this fact the interest was computed semi-annually and that on the 29th day of June, 1894, there was computed six months' interest due thereon amounting to $525, and that interest was computed on the interest then due, at the same rate to December 29, 1894, amounting to $18.37. That on the day

last named there was computed another six months installment of interest amounting to $525 upon which there was computed interest at the same rate to June 29th, 1895, amounting to $37.50, and at the time last named there was another installment of interest due on said note amounting to $525.00 all of which then amounting to $1,630.76, was added to the principal note of $15,000, the aggregate amount due on the day last named $16,630.76, which including interest at the same rate for thirteen days amounting to $42.00, overdraft for $596.74, and balance credit account of $230.50 amounting to $17,500.00 was the amount of the new notes. There was no written agreement that interest upon interest or upon overdrafts was to bear any rate of interest at all, hence no higher rate than six per cent could have been charged, and anything in excess of that was usurious under Sec. 3706."

"Section 5197, *supra*, provides that any association may take, receive and charge * * * interest at the rate allowed by the laws *of the state* * * * *where the bank is located and no more*, and we must look and to its statutes to see what rate of interest may be charged, for it is only by statutory enactment that interest can in any event be charged and collected.

"The National Banking Act restricts national banks in charging interest to the maximum amount allowed by the state, and provides that they shall charge 'no more'."

After demonstrating that each and every item of the transactions which culminated in the note, were tainted with usury the Court further finds and says:

"While we have considered these notes which entered into the general account of the parties in order to show that each and every one of them constituting it since June, 1893, was tainted with usury we might as well have disposed of the case from a different standpoint, that is, that the long account is one continuous transaction, one running account and that when any item of the account became tainted with usury it infected the entire transaction from that time."

The National Banking Law, Sec. 5197, provides that national banks "may take, receive, reserve, and charge

* * * * interest at the rate allowed by the laws of the state * * * where the bank is located and *no more,*" and Sec. 5187 provides "a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it or which has been agreed to pay thereon." In case a greater rate is charged than is allowed by Sec. 5197.

By the very terms of this section the rate of interest allowed to be charged is regulated by the laws of the state. The statutes of Missouri relating to interest are as follows:

REVISED STATUTES OF MISSOURI 1899.

Sec. 3705. *When no rate of interest is agreed upon, six per cent allowed as legal interest.*—Creditors shall be allowed to receive interest at the rate of six per cent per annum when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an expromise to pay interest had been made. (R. S. 1899, Sec. 5972)."

Sec. 3706. *Parties may agree in writing for interest not exceeding eight per cent.*—The parties may agree, in writing, for the payment of interest, not exceeding eight per cent per annum, on money due or to become due upon any contract. (R. S. 1889, Sec. 5973, Amended Laws 1891, p. 169 r)."

Sec. 3711. *Interest may be paid on interest—shall not be compounded oftener than once a year.*—Parties may

contract, in writing, for the payment of interest on interest; but the interest shall not be compounded oftener than once a year. Where a different rate is not expressed, interest upon interest shall be at the same rate as interest on the principal debt. (R. S. 1889, Sec. 5977—w)."

The case turned upon the construction of these sections as to the rate of interest which plaintiff was allowed to charge and upon the facts as found by the state Court.

BRIEF.

I.

Plaintiff in error invokes the jurisdiction of this Court on the ground that the decision of the Supreme Court of Missouri denied to it the right to charge interest allowed it under the National Banking Act, and it is well settled that this Court will not entertain jurisdiction on this ground unless the "title, right, privilege or immunity" was specially set up and claimed in the trial Court by the plaintiff in error, and the decision of the highest Court in the state was *against* the right thus set up and claimed. The special right was set up and claimed by the *defendant in error* and the decision was *in favor* of and *not against* the right claimed, and this Court is without jurisdiction. This is well settled by the decisions of this Court.

Kizer vs. Texarkana & Ft. S. Ry., 179 U. S., 199.
Dower vs. Richards, 151 U. S., 658.
Saward vs. Denny, 158 U. S., 180.
Jersey City & Bergan R. R. vs. Morgan, 160 U. S., 288.
Rae vs. Homestead Loan & Guarantee Co., 176 U. S., 121.
Abbott vs. Tacoma Bank, 175 U. S., 409.
De Lamar's Nevada G. M. Co. vs. Nesbitt, 177 U. S., 523.
Missouri vs. Andriano, 138 U. S., 496.
Schuyler National Bank vs. Ballong, 150 U. S., 85.
Gill vs. Oliver, 11 How., 529.
Fulton vs. McAffee, 16 Pet., 149.

Bank of Kentucky vs. Griffeth, 14 Pet., 56.
Whitten vs. Tomlinson, 160 U. S., 231.
Stroder vs. Baldwin, 9 How., 261.

II.

Not only must the "title, right, privilege or immunity" be specially set up and claimed by the plaintiff in error, but it must be done at the proper time, in the proper place and in the proper way. The plaintiff in error must have exhausted every effort in the state Courts to secure his rights under the Federal statutes before appealing to this Court. Beginning in the trial Court, by appropriate pleadings and actions and exceptions, step by step he should fight his way to the highest Court in the state—contending at every step for his special rights under the Federal laws. His contention comes too late if not made until after the highest Court has decided the case, when he files his motion for rehearing. This is equally well settled.

Mutual Life Ins. Co. vs. McGrew, 188 U. S., 291.
Jacobi vs. Alabama, 187 U. S., 133.
Layton vs. Missouri, 187 U. S., 356.
Miller vs. Texas, 153 U. S., 535.
Texas & C. Ry. Co. vs. South Pac. Co., 137 U. S., 48.
Morrison vs. Watson, 154 U. S., 111.
Brown vs. Massachusetts, 144 U. S., 573.
Meyer vs. Richmond, 172 U. S., 82.
Turner vs. Richardson, 180 U. S., 91.
Loeb vs. Schroeder, 149 U. S., 585.

III.

It is well settled that the appellate jurisdiction of the

Supreme Court of Missouri contemplates a review only of the matters submitted to and examined by the trial Court. Hence it is well settled that this Court has no jurisdiction on the ground that the plaintiff in error claimed and set up a special right under the Federal laws which was decided against it, unless the right was claimed in the trial Court.

Browning vs. Powers, 142 Mo., 322.
Bennett vs. Ry. Co., 105 Mo., 645.
And *Shewalter vs. Ry. Co.,* 152 Mo., 552.

Cited by this Court in *Lawton vs. Missouri,* 187 U. S., 361.

IV.

Section 5197 of the Revised Statutes gave the plaintiff no greater right to charge interest than was allowed it by the laws of Missouri. Under that section it had the right only to charge "interest at the rate allowed by the laws of the state, territory or district where the bank is located, *and no more.*" No Federal Statute is to be construed in determining the rate of interest which plaintiff was allowed to charge. He could claim no right to charge interest other than was allowed him by the state law. Section 5198 gave plaintiff no rights. It simply took away its right to collect any interest in case a greater rate was charged than was allowed by the state law.

Plainly, then, plaintiff's right to charge and collect interest under the National Banking Act, by the very terms of the Act, depends upon the Statutes of Missouri, and the construction placed thereon by its Supreme Court—"upon questions of fact and of local law, which are not reviewable by this Court."

Telluride Power Co. vs. Rio Grande Ry. Co., 187 U. S., 569.
Seeberger vs. McCormick, 175 U. S., 280.
Schafer vs. Werling, 188 U. S., 516.
Beals vs. Cone, 188 U. S., 184.
Manley vs. Park, 187 U. S., 551.
Kennard vs. Nebraska, 186 U. S., 304.
Gardner vs. Bonestell, 180 U. S., 362.

V.

The Supreme Court of Missouri found as a matter of fact, that, upon each and every item which entered into and formed a part of the note in question, the plaintiff charged interest at a greater rate than was allowed by the laws of the State of Missouri, and, "It is well settled that the finding of facts in the state Courts are, on a writ of error, conclusive" in this Court.

Jenkins vs. Neff, 186 U. S., 230.
Bement vs. National Harrow Co., 186 U. S., 83.
Gardner vs. Bonestell, 180 U. S., 362.
Thayer vs. Spratt, 189 U. S., 353.
Eagan vs. Hart, 165 U. S., 188.
Western Union Tel. Co. vs. Call Pub. Co., 181 U. S., 103; and cases there cited.

VI.

This Court does not acquire jurisdiction to review the decision of a state Court by reason of the certificate of the Chief Justice of the state Court that a Federal question is involved. The record is looked into in order to see if a special right was claimed in the proper way under the Federal laws and denied. The certificate is not conclusive on this Court.

Home for Incurables vs. City of N. Y., 187 U. S., 155.

Saymore vs. Denney, 158 U. S., 180.

VII.

The mere formal claim, now made, that the Supreme Court of Missouri construed said Sections 5197 and 5198 adverse to the interests of the plaintiff in error, even if it had been made in the proper manner and at the proper time, would not avail to give this Court jurisdiction. The only construction placed upon said sections followed the plain language thereof and the uniform decisions of this Court in construing the same, and was the only construction that could have been placed thereon. All controversy as to the meaning of the sections, has been completely foreclosed by the uniform decision of this Court. There is absolutely no room for further argument or discussion, and for this further reason, under the rules of this Court, "the motion to dismiss will prevail. *New Orleans Water Wks. Co. vs. Louisiana*, 185 U. S., 336, 345, and cases cited."

Equitable Life Ins. Co. vs. Brown, 187 U. S., 211.

The following well reasoned cases show how completely foreclosed is all controversy as to the construction of said Sections 5197 and 5198 of the National Banking Act.

Brown vs. Marion National Bank, 169 U. S., 416.
Danforth vs. National Bank, 48 Fed., 271.
National Bank vs. Hogeland, 7 Fed., 159.
National Bank vs. Regland, 181 U. S., 45.
Barnet vs. National Bank, 98 U. S., 555.
National Bank vs. Dearing, 91 U. S., 29.
Lake Benton National Bank vs. Will, 184 U. S., 155.
Haseltine vs. National Bank, 183 U. S., 132.

ARGUMENT.

There are but three classes of cases in which this Court will review and re-examine the decision of the Supreme Court of the state. They are distinctly set forth and clearly defined in Section 709 of the Revised Statutes. Plaintiff in error invokes the jurisdiction of this Court under what is termed the third clause of said section, claiming that the decision of the Supreme Court of Missouri denied it the right to collect interest on its transactions, conferred upon it by Sections 5197 and 5198 of the National Banking Act.

There are many reasons why we think this Court will not entertain jurisdiction and why the motion to dismiss should be sustained.

I.

The plaintiff in error did not "specially set up and claim" any right under the Federal laws in the state Court. It simply sued on a note given by the defendant. Its petition was in the plain, ordinary form of suits on notes. There were no pleadings of any kind filed in the state Court by the *plaintiff in error* claiming specially any rights under the Federal laws. The *defendant* did claim specially that he was entitled to have the interest abated because the plaintiff had charged a greater rate of interest on the transactions in question than was allowed by the laws of Missouri, by reason whereof under said Section 5198 of the National Banking Act plaintiff was not entitled to re-

cover any interest. Plaintiff simply denied that it had charged usury. It did not claim any affirmative rights under the Federal Statutes. Its position was a negative one. Its effort was not to secure any rights given by the Federal law, but rather to escape the penalties inflicted thereby. It was not looking to the Federal law for any help, but defending against its enforcement. *Defendant* was contending for the rights given him under the Federal law. Plaintiff was trying to defeat the rights given defendant under that law. If the plaintiff had been successful in the state Court the defendant undoubtedly would have been entitled to a writ of error in this Court. Not so with plaintiff who was trying to avoid the effects of the Federal Statutes. The state Court decided *in favor* of the right claim and by so doing gave full force and effect to the Federal Statutes. Did not "fritter away nor impair" any rights given under the statutes. The forfeiture clause of the National Banking Act invoked by defendant for his protection was permitted free course to accomplish its purpose. Plaintiff was permitted to *feel the full force* of the forfeiture provided by the Federal Statutes. Its only complaint is that the Federal Statutes were enforced too severely. Sec. 5198 conferred no rights whatever on plaintiff bank. It simply provided that by charging interest at a greater rate than was allowed by the laws of the state, the entire interest which the note carried with it or which was agreed to be paid thereon was forfeited. Under that section plaintiff did not and could not claim any rights. That section benefited alone the victims of usury and conferred no rights on the usurer. It took away the right to collect any interest when usury was

charged. The defendant invoked protection under this section. It afforded no protection to the plaintiff. The fact that the Supreme Court of Missouri construed this section did not give plaintiff the right to this writ of error. The construction was *in favor of* and *not against the right claim.*

In dismissing a writ of error in the case of *Kizer vs. Texarkana & Ft. S. Ry. Co.*, 179 U. S., 199, this Court said:

"It is not every case where a Federal Statute has been construed by the state Court that gives a right of review of this Court, but the claim of any right, title, privilege, or immunity under the statute must have been denied by the state tribunal in order to give us jurisdiction to review its judgment.

"That a Federal Statute was construed unfavorable to one of the patries to a suit is no ground for jurisdiction of this Court, unless such construction was not only unfavorable, but was against the right, etc., especially set up and claimed under the statutes. In that case the parties setting up and claiming the right under the statute which has been denied can obtain review here. Thus it might happen, as it has happened in this case, that, while the decision upon the construction of the statute was unfavorable to the maintenance of the cause of action set forth by the plaintiff in error, it was not against, but in favor of the claim made under the Federal Statute. The question whether that statute properly construed prohibited the making of such an agreement as that set up in the complaint in the state Court having been decided *in favor of* the claim set up by the *defendant* under the statutes, this Court has no jurisdiction to review the judgment."

The above case is very much like the case at bar. There the plaintiff in error sued the railroad company for violating its contract to haul ties at a specified rate. The defendant pleaded that the contract was void because it was prohibited by the Federal Inter-State Commerce Law.

The Supreme Court of Arkansas sustained the contention of the defendant and upheld the rights claimed under the Federal law and this Court decided that the plaintiff was not entitled to have the case reviewed by this Court because the decision was *in favor* of the *right claimed*. We see no difference between that case and the one at bar. Here the plaintiff sued on a note instead of a contract and the defendant claims that plaintiff's right to collect interest was forfeited because it violated the Federal law and the decision was *in favor* and *not against* the right claim.

Again it is said by this Court:

"There was undoubtedly a Federal question raised in this case, but it was raised by the plaintiff, Nesbit * * * * the decision of the Court, however, was in favor of and not against the right claimed under the statute and of this construction the plaintiff in error is in no position to take advantage as it made no claim under those statutes * * * * it is manifest that the object of Section 709 was not to give a right of review whenever the validity of an act of Congress was drawn in question, but to prevent states from frittering away the authority of the Federal government by limiting too closely the construction of Federal Statutes. Hence the writ of error will only lie when the decision is adverse to the right claims. To the same effect are *Dower vs. Richards*, 151 U. S., 658; *Seyward vs. Denny*, 158 U. S., 180; *Jersey City & Bergen R. R. vs. Morgan*, 160 U. S., 288; *Roe vs. Homestead Loan & Guaranty Co.*, 176 U. S., 121; *Abbott vs. Tacoma Bank*, 175 U. S., 490."

De LaMar's Nevada G. M. Co. vs. Nesbitt, 177 U. S., 523.

In another part of the opinion in the Nesbitt case the Court also cites with approval the case of *Missouri vs. Andriano*, 138 U. S., 496, which seems to be one of the leading cases sustaining this proposition.

The case of *Schuyler National Bank vs. Bolang,* 150 U. S., 85, was a suit for penalty brought against the plaintiff in error in which it was claimed that it violated the National Banking Act in charging usury, and in that respect very much like the case at bar. Judgment was recovered against the bank and it sued out the writ of error. The writ was dismissed for the want of jurisdiction. The question decided is stated in the syllabus as follows:

"In order to maintain a writ of error against a judgment of the highest Court of a state it must appear that the judgment involved a decision against a right, title, privilege or immunity claimed by the plaintiff in error under the Constitutional Laws of the United States, which was specially set up or claimed under the state Court at the proper time and in the proper way."

This question was very fully discussed in the case of *Missouri vs. Andriano,* in which the Court said, *inter alia*:

"The object of the present judiciary act was not to give a right of review whenever the validity of an act of Congress was drawn in question, but to prevent the Courts of the several states from impairing or frittering away the authority of the general government, by giving a construction to its statutes adverse to such authority. Of course if the construction given by the state Court to the act under which the act is claimed to be favorable to such right, no such reason exists for a review by this Court."

Missouri vs. Andriano, 138 U. S., 496.

This question was thoroughly discussed in an early day by this Court in a class of bankruptcy cases where the defendant plead in bar his discharge in bankruptcy. In all of those cases its was held that when the state Courts gave the defendant the rights which he claimed under the National Bankrupt Law, this Court would not review the

judgment of the state Court on a writ of error sued out by plaintiff. Mr. Chief Justice TANEY delivering the opinion of the Court in one of those cases, said:

"The writ must, we presume, have been prosecuted under a misconstruction of the 25th Section of the Act of 1789, Chapter 20. We have no jurisdiction over the judgment of a state Court upon a writ of error, except in cases specified in that section and the jurisdiction of this Court is there limited with great care and in plain terms. It gives a writ of error to this Court when a party claims a right or exemption under a law of Congress and the decision is *against* the right claimed. Undoubtedly the defendant, in pleading his discharge under the Bankrupt Law, claimed a right or exemption under a law of Congress. But in order to give jurisdiction something more is necessary. The judgment of the state Court must be *against* the right claimed. In the case before us the decision was *in favor* of it and consequently no writ of error will lie * * * * and as we have no jurisdiction we cannot examine into the objections made to the validity to the proceedings in bankruptcy. The judgment of the state Court that they were valid, and the defendant thereby discharged from the debt due the plaintiff is conclusive between the parties."

Linton vs. Stanton, 12 How. 423.
See also *Fulton vs. Macabee,* 16 Pet., 149.

It was also held, where the plaintiff sued on a note and the defense was made that the note was void, being bills of credit under the Constitution of the U. S. and the state Court maintained the defense deciding that the Kentucky law authorizing the issue of the note was in conflict with the Constitution of the United States and void, that the plaintiff could not maintain a writ of error in this Court because the decision was *in favor of* and not *against* the right claim.

Bank of Kentucky vs. Griffith, 14 Pet., 56.

It will be observed that the analogy is almost perfect between this class of cases and the case at bar.

Again, it is said:

"By the judicial system of the United States established by Congress under the power conferred upon it by the Constitution the jurisdiction of the Courts of the several states has not been controlled or interfered with except so far as necessary to secure the supremacy of the Constitution, laws and treaties of the United States * * * such appellate jurisdiction is expressly limited to cases in which the decision of the state Court is *against the right claimed* under the Constitution, etc.".

Whitten vs. Tomlinson, 160 U. S., 231.

The trustees of a bank brought suit in assumsit against the defendant who pleaded his discharge in bankruptcy. The decision of the state Court was in his favor. Plaintiff sued out writ of error which was dismissed by this Court. The language used by the Court is certainly applicable to the case at bar. We quote as follows:

"The plaintiffs in this case have set up no act of Congress in their pleadings under which they support their claim or title to recover. It is the defendant who has pleaded a privilege or exemption under a statute of the United States and it relies upon it as its only defense, if the decision of the state Court had been against him his right to have his case re-examined by this Court would not be doubted. But the decision has been *in favor* of the right set up under the statute, the validity of which was denied by the plaintiff. We have no jurisdiction to entertain a writ of error to the Supreme Court of Ohio at their suggestion."

Strader vs. Baldwin, 9 How., 261.

Thus it appears to us, beyond controversy, that the plaintiff cannot maintain this writ of error as the Supreme

Court of Missouri decided *in favor of* and *not against the right* set up under the Federal Statutes.

II.

Still there are other reasons why this Court should sustain this motion to dismiss. The decision of the Missouri Supreme Court, sought to be reviewed, was based solely upon considerations of local statutes and general law and upon questions of fact.

The sole question to be decided was, did the plaintiff charge interest on the transactions in question at a greater rate than was allowed by the laws of Missouri? Question of fact—What rate of interest did it charge? Question of law—What rate was it *allowed* to charge by the *laws of Missouri?* The Supreme Court of Missouri decided, *as a matter of fact,* that in *each and every transaction* culminating in the note in question, the plaintiff charged a rate of interest greater than it was allowed to charge, *as a matter of law,* by the laws of Missouri according to its construction of the Missouri statutes. No Federal statute was construed in arriving at this conclusion. Section 5197 does not pretend to fix the rate of interest, when it has been fixed by the law of the state where the bank is located. In plain and express terms it provides that a bank may charge "interest at the rate allowed by the laws of the state, territory or district where the bank is *located* and *no more.*" It was not necessary to construe that section in order to arrive at "the laws of the state" which alone regulated the rate of interest. "The laws of the state," are its statutes as construed by its Supreme Court. A national bank has the same rights as any other citizen of the state to charge

interest on its transactions. The rate of interest can be ascertained only by looking to the state statutes and construction placed thereon by the state's Supreme Court. And it has been decided over and over again by this Court that it will not entertain jurisdiction of a writ of error to review the decision of the Supreme Court of a state upon the finding of facts and the constructions of its own statutes.

Thus:

"Upon a writ of error to a state Court this Court has no right to review its decisions upon the ground that the finding was against the evidence or the weight of evidence."

Thayer vs. Spratt, 189 U. S., 353.
See also *Eagan vs. Hart,* 165 U. S., 188.

Again:

"In this Court we are concluded by the finding of facts made in a state Court in a suit in equity as well as a suit at law."

Bement vs. National Harrow Co., 186 U. S., 83.

Also:

"It is well settled that the finding of facts in the state Court on a writ of error is conclusive with us."

Jenkins vs. Neff, 186 U. S., 230.

In the case at bar, the *facts* were decided against the plaintiff in error and the Supreme Court of Missouri simply interpreted its own statutes regulating the rate of interest. Plainly, whatever rights plaintiff had under the National Banking Act, "depended upon questions of fact and of local law which are not reviewable by this Court."

Telleride Power Co. vs. Rio Grande Ry. Co., 187 U. S. 569.

"And questions of fact, as has been repeatedly held, when once settled in the Courts of a state, are not subject to review in this Court."

Western Union Tel. Co. vs. Call Pub. Co., 181 U. S., 103., l. c., and cases cited.

All the plaintiff in error can possibly claim is that the Supreme Court of Missouri gave a wrong construction of the statutes of Missouri fixing the rate of interest allowed to be charged, and with that construction this Court will not interfere.

"Of course, the construction placed by the Supreme Court of a state upon its statutes is, in a case of this kind, conclusive upon this Court.

Forsythe vs. Hammond, 166 U. S., 506, 518, and cases cited."

Schaefer vs. Werling, 188 U. S., 516.
See also *Manley vs. Park,* 187 U. S., 547.

"The decision by the Supreme Court of the state, that the Pawnee reservation lands in Nebraska were public lands within the meaning of the twelfth section of the enabling act, did not bring into question the validity of that section. Much less was it a decision against its validity."

Kennard vs. Nebraska, 186 U. S., 304.

"The construction by the Courts of a state of its constitution and statutes is, as a general rule, binding upon the Federal Courts. We may think that the Supreme Court of a state has misconstrued its constitution or statutes, but we are not at liberty to set aside its judgments. That Court is the final arbiter as to such questions."

Forsythe vs. Hammond, 166 U. S., 518, and cases cited.

"The construction given to the statute of a state by the highest tribunal of such state is regarded as part of such statute, and is as binding upon the Courts of the United States as the text."

Liffingwell vs. Warren, 2 Black, 599.

These quotations could be prolonged almost indefinitely, but we take it there can be no possible question as to the correctness of our contention. If there ever could have been any doubt as to the proposition, it has been entirely removed by the decisions of this Court. There is no room for argument.

Therefore, as the decision of the Supreme Court of Missouri turns solely upon questions of fact and upon the construction of the laws of Missouri regulating interest charges, this Court will not review the decision, and the motion to dismiss should be sustained.

III.

If it should be contented that the Supreme Court of Missouri, construed Section 5198 of the National Banking Act adverse to the rights of plaintiff in error and that therefore this Court has jurisdiction to review, we answer that Section 5198 gave no right, privileges or immunities to plaintiff in error. We have seen that Section 5197 left plaintiff's right to charge interest to the laws of Missouri. Now Section 5198 simply says that if a greater rate is charged than allowed by that section all the interest which the note "carries with it or which is agreed to be paid

thereon" is forfeited. And after finding that plaintiff had charged interest at a greater rate than is allowed by the laws of Missouri, the Court simply decided that all the interest which the note "carried with it and which was agreed to be paid thereon" was forfeited under said Section 5198. So far it construed that section. No other construction was or could be contended for by plaintiff. When it is admitted that the plaintiff charged a greater rate than was allowed by Section 5197, or, which is the same thing, when the Supreme Court of Missouri, whose judgment in this regard is not open to review, so found, then the forfeiture of the interest under Section 5198 necessarily followed. There was no other conclusion to reach. The language of the section is plain and the decisions of this Court very uniform in construing the section to mean just what it says. So that the mere fact that the Supreme Court passed on this section and construed it to mean just what its very plain language says, and just what the uniform decisions of this Court construed it to mean, does not give this Court jurisdiction to review that decision. In other words the Federal question was simply a formal one. It has been so explicitly and frequently passed upon by this Court as to be foreclosed against further argument, and when such is the case this Court will not entertain jurisdiction of a writ of error.

This Court recently said:

"But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. There must be a real substantive question on which the cases may be made to turn, that is, a real and not merely formal Federal question, is essential to the jurisdiction of this Court. Stated in another form, the doctrine thus declared is, that

although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or *has been so explicitly foreclosed by a decision* or decisions of this Court as to leave no room for real controversy, the motion to dismiss will prevail.

New Orleans Water Wks. Co. vs. Louisiana, 185 U. S., 336, 345, and cases cited."

Equitable Life Ins. Co., vs. Brown, 187 U. S., 311.

Taken from any standpoint, it is manifest that this Court has no jurisdiction in the premises, and the writ of error should be dismissed and the decision of the Supreme Court of Missouri affirmed.

Respectfully submitted,

EDWARD P. GARNETT,

Counsel for the Defendant in Error for the Purposes of These Motions.

Supreme Court of the United States.

No 36.—October Term, 1904.

The Citizens' National Bank of Kansas City, Missouri, Plaintiff in Error, *vs.* M. S. C. Donnell. } In Error to the Supreme Court of the State of Missouri.

[November 28, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a writ of error to the Supreme Court of Missouri on the ground that the plaintiff in error is denied the rights with regard to charging interest conferred upon it by the national banking act. Rev. Stats. §§ 5197, 5198. The suit was brought by the plaintiff in error upon a promissory note for twenty thousand dollars, with interest at eight per cent, made on April 29, 1892. The facts, shortly stated, are as follows: On October 29, 1892, the plaintiff bought the defendant's note for $15,000, with interest at seven per cent. On July 12, 1895, the defendant being behindhand with his payments of interest and also having overdrawn a bank account which he kept in the plaintiff's bank, he gave the plaintiff a new note for $17,500, and interest at seven per cent, in satisfaction of both liabilities. The amount of this note included three semi-annual interest charges, of $525 each, with a few days' further interest, on the former note, with interest on this interest from the time it was due, and charges of one per cent or more a month on the amount overdrawn each month. It left the defendant with a credit on his bank account of $230.50. On April 29, 1896, the note in suit and another note for $2,000 were given in satisfaction of the last note for $17,500, and of another note for $2,500, of October 1, 1895, with interest accrued on both, and of an overdraft of $919.90, and a balance of $2.42. The overdraft item included, as before, charges of about one per cent a month on the amounts actually overdrawn.

The Supreme Court of Missouri held that the plaintiff must forfeit all interest from the beginning of the above transactions, and could recover only the original fifteen thousand dollars, the actual overdraft on July 12, 1895, four hundred and seventy-four dollars and twenty-four cents, the bank credit of two hundred and thirty dollars given the same day, the note of October 1, 1895, for twenty-five hundred dollars, the overdraft on April 25, 1896, of eight hundred and seventy-four dollars and eighty-one cents and the bank credit of two dollars and forty-two cents—in all,

nineteen thousand eighty-one dollars and ninety-seven cents, less fifty-five hundred dollars collected on account since the action was begun. 172 Mo. 384.

By the United States Rev. Sts. § 5197, a bank may charge "interest at the rate allowed by the laws of the State, . . . where the bank is located, and no more." By § 5198 taking, receiving, or charging "a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon." The Revised Statutes of Missouri fix six per cent as the rate of interest in the absence of agreement, § 3705, but allow parties to agree in writing for not over eight per cent. § 3706. They also allow parties to contract in writing for the payment of interest upon interest, "but the interest shall not be compounded oftener than once in a year," § 3711. It will be seen that the charge on the overdrafts went beyond § 3706, and the compounding of the semi-annual interest on the notes encountered § 3711.

The plaintiff in error denies that the prohibition of compounding oftener than once a year affects the "rate of interest" within the meaning of those words in U. S. Rev. Sts. § 5198, and contends that so long as the total sums received would not amount to more than eight per cent on the debt, it has a right to charge them under U. S. Rev. Sts. § 5197, coupled with Mo. Rev. Sts. § 3706. It disposes of the twelve per cent charge on overdrafts by the suggestion that the amount is trifling and *de minimis non curat lex*, and that this charge was a penalty because of a failure to pay a debt when due, and therefore not usurious. We are of a different opinion. The rate of interest which a man receives is greater when he is allowed to compound than when he is not, the other elements in the case being the same. Even if the compounded interest is less than might be charged directly without compounding, a statute may forbid enlarging the rate in that way, whatever may be the rules of the common law. The Supreme Court of Missouri holds that that is what the Missouri statute has done. On that point and on the question whether what was done amounted to compounding within the meaning of the Missouri statute, we follow the State Court. *Union National Bank* v. *Louisville, New Albany & Chicago Ry.*, 163 U. S. 325, 331. Therefore, since the interest charged and received by the plaintiff was compounded more than once a year it was at a rate greater than was allowed by U. S. Rev. Sts. § 5197, and it was forfeited. The suggestions as to the twelve per cent charge on overdrafts do not seem to us to need answer.

There is no doubt, of course, that the Court could go behind the face of the present note and analyze the sum which it represents into its original

elements. *Brown* v. *Marion National Bank*, 169 U. S. 416. *Haseltine* v. *Central National Bank*, 183 U. S. 132, 135, 136. These cases sufficiently show also, if more is wanted than the words of Rev. Sts. § 5198, that the Court below did not err in forfeiting all the interest from the beginning.

We perceive no warrant in the statute or the cases for the contention that the bank, when it brings the action and is met by the plea of usury, may avoid the forfeiture imposed by Rev. Sts., § 5198, in absolute terms, by then declaring an election to remit the excessive interest.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.